RECORD, CASE No. 15,050.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1080.

SALLIE G. THORINGTON, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF MONTGOMERY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1892.

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1 Supreme Court of the State of Alabama, November Term, 1891.

SUPREME COURT, TUESDAY, *November 3rd*, 1891.

Be it remembered that a regular term of the supreme court of the State of Alabama was begun and holden according to law at the capitol, in the city of Montgomery, on Tuesday, the third day of November, 1891, it being the first Tuesday of said month.

Present and presiding as justices of said court:
Hon. George W. Stone, chief justice.
Hon. David Clopton, associate justice.
Hon. Thomas N. McClellan, "
Hon. Thomas W. Coleman, "
Hon. Richard W. Walker, "

SUPREME COURT, WEDNESDAY, *Dec. 16th*, 1891.

The court met pursuant to adjournment.
Present: All the justices.

2 *Original Bill.*

STATE OF ALABAMA,
Montgomery County.

In Chancery, at Montgomery.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY.

To Hon. John A. Foster, chancellor of the southern division of the State of Alabama:

Humbly complaining, your oratrix, Sallie G. Thorington, respectfully shows unto your honor:

I. That she is an unmarried woman over the age of 21 years, residing in the city of Montgomery.

II. That on the 22nd day of Feb., 1882, the said "The City Council of Montgomery" filed its bill in the said chancery court at Montgomery against Joseph S. Winter and Mary E. Winter, his wife, to enforce the payment of certain municipal tax claims and demands assessed by the said city council for the several municipal years, 1873 to 1882, inclusive, against certain plats of land in the aforesaid city of Montgomery, alleged in said bill to belong during the several years so named to the defendant, Mary E. Winter, and that a description of the property set out and described in said bill is hereto annexed, marked "Exhibit A," as a part of this complaint.

III. That a decree was rendered in said cause by the said chancery court in favor of complainants for forty-four hundred and forty and $\frac{4}{100}$ dollars, and that a copy of the same is hereto appended, marked "Exhibit B," and made a part of this bill; that the said

Joseph S. and Mary E. Winter appealed from said decree to the hon'l supreme court of the State of Alabama, they giving bond with good and sufficient security to the register of the said chancery court for the costs, &c., of said appeal, and that the same was duly approved by the said register with effect to stay all proceedings on and under said decree pending the said appeal.

IV. That on the 10th of December, 1885, the said hon'l
3 supreme court rendered a decision in the cause so appealed affirming the decree of the said chancery court, and that on the 27th day of said December, 1885, V. M. Elmore, the register of the said chancery court, with intent to enforce and satisfy the decree so affirmed, advertised in a newspaper published daily in the city of Montgomery, known as "The Montgomery Advertiser," that he as register aforesaid will sell the property set out and described in said bill and the said Exhibit A hereto attached as aforesaid on Monday, the 25th day of January, 1886, between the usual hours of sale, at the artesian basin, in the aforesaid city of Montgomery, to the highest bidder for cash, and that a copy of said advertisement is hereto attached, marked Exhibit C, and made a part of this bill.

V. That said advertisement has been published in the said newspaper every week since, and that, unless restrained by the proper order of your honor, the said register will sell the property so advertised according to the terms and conditions of said decree and as advertised aforesaid, or so much thereof as may be necessary to satisfy said decree.

VI. Oratrix further shows unto your honor that the said The City Council of Montgomery, on the 17th day of February, 1885, levied a tax for the current municipal year's taxes on the following lots or parcels of land, in said city of Montgomery, of those set out and described in the said advertisement of sale made, as charged aforesaid by the said register, the property so assessed and taxed by the said city council of Montgomery as the property of the said Mary Elhuter, to wit, "25 x 300 of the east part of lots 6 and 7, square 4, in the city of Montgomery; the north part of lot one (1), south side of Dexter avenue, in the city of Montgomery," and also assessed and levied a tax in and for the said current municipal year, 1885, on the following-described property as the property of the said Mary E. Winter, to wit, "the residence on the west side of Root street between Mildred and Root street- and the plank road north of and adjoining the residence of Mrs. Sallie G. Thorington, in the city of Montgomery."

4 And in pursuance of the said assessment the said city council obtained a decree before the recorder's court in the city of Montgomery on the 1st day of October, 1885, against the said lands as the property of the said Mary E. Winter for the taxes so assessed and levied by the said The City Council of Montgomery, to wit, against "the lot of 25 x 300 feet of the east part of lots 6 & 7, square No. 4 aforesaid; a decree for eleven & $\frac{01}{100}$ dollars against the north part of lot 1, south side of Dexter avenue aforesaid; a decree for three hundred and five dollars (305.00) against the residence on the west side of Root street between Root and Mildred streets, and

the plank road north of and adjoining the residence of Mrs. Sallie G. Thorington, in the city of Montgomery aforesaid, a decree of seventy-seven dollars ($77.06), and that in pursuance of the decree the said city council of Montgomery advertised the said several parcels of land to be sold under the said decrees on Monday, the 16th day of November, 1885, at the artesian basin, in the city of Montgomery, between the usual hours of sale, to satisfy the said several decrees, but that on the said named day and at the said time and place the said sale was postponed by the clerk of the said city council, one R. B. Snodgrass, until Monday, the 23rd day of November, 1885, at the same time and place, and on the said last-named day the said sale was again postponed until the 30th day of November, 1885, at the same time and place, and according to the notice so last given by the said clerk of the city council aforesaid, the said R. B. Snodgrass, in pursuance of the terms of said decree of the said recorder's court, offered for sale to the highest bidder, for cash, the said several plots or parcels of land, and that oratrix, as the highest bidder at such sale, became the purchaser of each and every parcel or plot thereof at the sum in each case of the decree of said recorder's court against the tracts so sold as aforesaid, and thereafter, to wit, on the said 30th day of November, 1885, paid to the said clerk the sum in each case so bid, getting from him, the said clerk, in each case a receipt or certificate in form substantially with the copy of one of said certificates hereto attached, marked Exhibit D, except as — the amount paid and the description of the lands contained, these varying in each case to conform to the facts, and that oratrix is still the holder and owner of the said certificates, with all the rights of purchase that accrued to her under her said purchases of the lots so named and described respectively and as evidenced by said certificates severally.

VII. That the value severally of the said lots or parcel of lands advertised as aforesaid to be sold by the said register on the said 25th day of January, 1886, as assessed for State and county taxes by the tax assessor of said Montgomery county for the year 1885, and also as assessed and taxed by the said city council for said year 1885, is, as appears by the statement of said valuation in the memorandum attached, marked "Exhibit E," which is made a part of this bill.

VIII. And oratrix further shows unto your honor that the sale made as aforesaid by the said clerk of said city council on the said 30th of Nov., 1885, to your oratrix as aforesaid was a sale and divestment of all the interest as such time had or to be claimed by the said The City Council of Montgomery in and to said property so embraced and included in said sale, without any reservation whatever, expressed or implied, and that it carried with and so vested in oratrix, as the purchaser aforesaid, every right in and to said property, save and except the right of redemption, specifically reserved by the provision of the act aforesaid of February 17, 1885, and any right that might be in the State under our statutes by virtue of particular facts.

IX. Your oratrix further shows unto your honor that a sale of

said property purchased by her at the said sale made by said clerk of said city council would be unjust and unequitable when, as averred, there is sufficient other property ordered by said decree of the chancery court to satisfy the decree, and would be a cloud upon the title of your oratrix and involve her in useless and unnecessary litigation and would greatly inpair the value of
6 her said purchase.

To the end that your oratrix may have and obtain the relief hereinafter prayed for and to which she is entitled under this bill, she makes the city council of Montgomery party defendant to this bill and prays that it be served with summons to answer this bill and be required to answer the same as is prayed for in the note hereunder written.

Your oratrix prays your honor to decree that said city council be forever enjoined from selling under said chancery decree the lands purchased by your oratrix at said sale made by said clerk of said city council, and that your honor will grant and decree such other and further relief as may be just and equitable and to which she may be entitled under this bill; and she will ever pray, &c.

ARRINGTON & GRAHAM,
Sol'rs for Complainant.

NOTE.—The defendant is required to answer each and every allegation and averment contained in the foregoing bill, but its answer under oath is hereby expressly waived.

ARRINGTON & GRAHAM,
Sol'rs for Complainant.

STATE OF ALABAMA, }
Montgomery County, } ss:

Personally appeared before *he*, Daniel H. Workman, a justice of the peace in and for the said county, Joseph S. Winter, of same State and county, who, being duly sworn, deposeth and saith that he has personal knowledge of the matters and things set out as facts in the foregoing bill of complaint, and that from his said personal knowledge of said statement of face he says that they are true.

JOS. S. WINTER.

Sworn to and subscribed before me this the 20th day of January, 1886.

D. H. WORKMAN, *J. P.*

7 EXHIBIT A.

Copy of Papers Set Out in the Bill.

1st. Lot on the *b*orth side of Root street, at the corner of Mildred and Root streets, being the residence of said Mary E. Winter.

2nd. Lots 50 x 100 feet on the south side of Washington street, on which stores are situated, half of which was conveyed to John G. Winter in December, 1871.

3rd. Lots on south side of Washington street, 20 x 80 feet.

4th. Lots on soth side of Market street, at the corner of Court & Market streets, being the north part of lot 1.

5th. Lot on west side of Hull street, in square south of Grove street, being in square 5, in Goldthwaite plat, between Grove and South streets.

6th. Lot 25 x 100 feet on north side of Tallapoosa street, in square 4, East Alabama.

7th. Lot 25 x 100 feet on the north side of Tallapoosa street, being a part of the lot above mentioned.

EXHIBIT B.

In Chancery, at Montgomery, Alabama. In Equity.

CITY COUNCIL OF MONTGOMERY
v.
MARY E. WINTER *et al.*

This cause was submitted at the spring term, 1884, on the report of the register for final decree and held for consideration. At the fall term, 1883, it had been submitted by agreement on file, to be considered in vacation, but the file had not been delivered to the chancellor before the spring term, 1884, and no action had been taked when the papers were sent to the chancellor. In August, 1884, there were two notes of testimony on file, one filed Oct. 20th, 1883, and the other filed on July 3, 1884, as note of testimony No. 2. On July 7, 1884, the defendant also filed six (6) exceptions to the register's report.

There seemed to have been exceptions to the ruling of
8 the register on the admissibility of testimony on the reference, but as they are not alluded to in the exceptions nor in the note of testimony they need not be noticed.

1st. The agreement and the decree of reference is that defendant is chargeable with such an amount of the railroad taxes for 1872, '4, '5, '6 as may be found to be proper upon ascertaining what rate of taxation upon real and personal property respectively was necessary to pay interest on the railroad bonds. The register on his report finds that no tax on personal property was levied in that year for this purpose fell exclusively on real estate. It does not seem that this finding is opposed to the agreement or the order of reference had thereupon. It is ordered that the 1st exception be overruled.

2nd. It seems to the court that there was sufficient testimony before the register to support his finding that the several parcels of land were the property of defendant Mary E. Winter in 1873 and continued to be in such condition that a lien attached to them as her property in the succeeding years; and thereupon it is ordered that the 2nd objection to the register's report be overruled.

3rd. If lands are sold for taxes and a deed made to the city they cannot be redeemed except upon the payment of taxes not only for the year for which they were sold, but also for the succeeding years;

and so if both parties choose to regard the sale as void a lien attached to the land for the payment of the taxes from the first year to its enforcement. It is therefore considered that the 3rd exception to the register's report be overruled.

4th. There does not appear anywhere an agreement or consent to arbitration. In the 4th paragraph of the agreement it is provided what shall be done if certain things shall be decided by arbitration, but this cannot be construed into an obligation to submit to arbitration. It is therefore ordered that the 4th exception to the register's report be overruled.

5th and 6th. These exceptions are too general and for other reasons are not maintainable; and thereupon it is ordered that the exceptions to the register's report be hereby overruled; and
9 it is ordered, adjudged, and decreed that the register's report be in all things confirmed.

And it appearing from said report and the testimony that the sum of $4,440.50 is due to complainant for taxes for said years from defendant upon the lands described in the pleadings, one-third of which is due by agreement on the 5th day of July, 1883, one-third on the 5th day of July, 1884, and one-third on the 5th day of July, 1885, without interest, it is therefore considered, adjudged, and decreed that complainant has a lien upon the real estate described in the bill or pleadings for the payment of the taxes as aforesaid on the same, and that unless the defendant pay to the register in 20 days after the filing of this decree all the costs of this cause and two-thirds of the sum of $4,440.50 to complainant the register of this court will proceed to advertise and sell the lands described in the pleadings in accordance with the rules and regulations governing the sale of said property under execution at law, and out of the proceeds of said sale he will retain and pay the costs and expenses of this suit and said sale and then two-thirds of said sum of $4,440.50, to wit, the sum of $2,960.33, to complainant if sufficient thereunto and if not sufficient then so far forth as the same will extend; but if less than the whole of said real estate will be sufficient to pay said costs, expenses, and taxes aforesaid, then the register will sell such portion of said lands only as will be sufficient, first selling those portions which may be selected to be sold, if any, by defendant; but if the said costs and expenses are paid and the said sum of $2,960.33 before a sale of said land, then no further sale will be made until after July 5, 1885, when the register will advertise and sell as above directed the whole or any portion of said lands remaining unsold unless the costs and expenses are first paid to the register and the remaining one-third of said sum of $4,440.50, to wit, $1,480.17, *are* paid to complainant, and the register will apply the proceeds to the payment of said costs and expenses as are
10 unpaid and to the payment of said sum of $1,480.17 to complainant, and if a balance shall remain in his hands of said proceeds he will pay the same to the defendant Mary E. Winter. The register will make a deed to the purchaser or purchasers and put him in possession of the premises upon his complying with the terms of the sale complainant may bid at such sales.

JOHN A. FOSTER, *Chancellor.*

"EXHIBIT C."

Chancery Sale of Valuable City Property.

In Chancery, at Montgomery, Alabama.

THE CITY COUNCIL OF MONTGOMERY }
v.
MARY E. WINTER *et al.* }

Under and by virtue of a decree rendered by the chancery court for the county of Montgomery in the above-stated cause on the 15th day of August, 1884, and modified at the October term, 1884, of said court, and affirmed by decree of the supreme court at the December term, 1885, I will proceed to sell to the highest bidder, for cash, at the Artesian basin, in the city of Montgomery, Alabama, between the legal hours of sale on Monday, the 25th day of January, 1886, the following-described real estate, to wit: Lot on the west side of Root street, at the corner of Root and Mildred streets, being the residence of the said Mary E. Winter.

One-half interest in lot 50 x 100 feet on the south side of Washington, at the corner of Court and Washington, on which stores are situated, being the south half of said lot; lot on the south side of Washington street, at the corner of Court and Washington, twenty by eighty feet (20 x 80); lot on the south side of Market street, at the corner of Court and Market streets, being the north part of lot one (1), on which stores are situated.

11 Lot on the west side of Hull street, in square (5) five, in Goldthwaite's plat, between Grove and South streets.

Lot twenty-five by three hundred (25 x 300) feet on the north side of Tallapoosa street, in square (4), East Alabama.

All being in the city of Montgomery, State of Alabama.

V. M. ELMORE, *Register.*

"EXHIBIT D."

THE STATE OF ALABAMA, }
City of Montgomery. }

Know all men by these presents that whereas on the first day of October, A. D. 1885, a decree was rendered by Hon. Edward A. Graham, recorder of the city of Montgomery, against the 25 x 300 feet of the east part of lots 6 and 7, square No. 4, East Alabama, in the city of Montgomery, for the sum of eleven and $\frac{1}{100}$ dollars for the unpaid municipal taxes and the interest and costs thereon, which was assessed to Mrs. Mary E. Winter; and whereas after advertising said property for sale according to law under and by virtue of said decree I did sell said property at the Artesian basin, in the city of Montgomery, to the highest bidder for cash:

Now, therefore, I, R. B. Snodgrass, clerk of the city council of Montgomery, hereby certify that at said sale Mrs. Sallie G. Thorington

bid off and became the purchaser of said property at and for the sum of eleven and $\frac{1}{100}$ dollars, being the amount of said decree and the interest thereon to date, which said amount the said Sallie G. Thorington has this day paid to me.

Given under my hand this the 30th day of November, A. D. 1885.

R. B. SNODGRASS,
Clerk of the City Council.

"EXHIBIT E."

Assessed Valuations for Taxes 1885 *for City and County.*

12

1. Lot on the west side of Root street, at the corner of Mildred and Root streets, being the residence of the said Mary. E Winter. Assessed value	$6,500
2. One-half interest in lot 50 x 100 on the south side of Washington street, on which stores are situated, the same being the south half of said lot. Assessed value	3,500
3. Lot on south side of Court & Washington streets, 20 x 80 feet. Assessed value	4,000
4. Lot on south side of Market street, at the corner of — Market streets, being the N. part of lot 1, on which stores are situated. Assessed value	25,000
5. Lot on west side of Hull street, in square 5, in Goldthwaite plat, between Grove and South streets. Assessed value	300
6. Lot on Tallapoosa street, 25 x 300, on north side of Tallapoosa street, in square 4, East Alabama. Assessed value	500

I hereby certify that the statement hereto annexed, marked Exhibit E, of the valuation assessed and imposed by such assessment by the tax assessor for the city of Montgomery of the property embraced and set forth in said exhibit for the current municipal tax year 1885 is correct as to each and every of the pieces or plats therein described except that numbered "6" on said exhibit, which, however, was the succeeding year, 1886, assessed at $300, and since, and that the said property so in said exhibit described was taxed for said year 1885 on the basis of valuation determined by the assessment by the said city.

[Seal of the City Council of Montgomery.]

R. B. SNODGRASS,
Clerk of the City Council of Montgomery, Ala.

13

Fiat for Injunction.

To the register in chancery at Montgomery:

Upon complainant entering into bond, with sufficient sureties, payable to you as register, conditioned to pay all damages and costs caused to any one by the injunction if wrongful or if dis-

solved, in the sum of two hundred dollars let injunction issue as prayed for.

January 21st, 1886.

JOHN P. HUBBARD,
Judge 2 Circuit.

Filed in office January 23rd, 1886.

V. M. ELMORE, *Register.*

Injunction Bond.

THE STATE OF ALABAMA, }
Montgomery County. }

Know all men by these presents that we, Sallie G. Thorington and her sureties, Mary E. Winter, Mary L. Thorington, and H. C. Weber, are held and firmly bound unto the register in chancery for the second district of the southern chancery division of said State, composed of the county of Montgomery, in the sum of two hundred dollars; for the payment of which we bind ourselves and our representatives. The condition of the above obligation is such that whereas the said Sallie G. Thorington has filed her bill of complaint in the said chancery court and has obtained thereon an order for the issuance of an injunction from the Honorable John P. Hubbard, one of the circuit judges of the State of Alabama, to enjoin the city council of Montgomery from selling under the decree of the chancery court for Montgomery county, being the 8th chancery district of the southern chancery division of the State of Alabama, filed the 15th day of August, 1885, the following-described lands, situated in the city of Montgomery, in the State of Alabama, to wit: 25 by 300 feet of the east part of lots six and seven, in square number 4; the north part of lot one, on the south side of Dexter avenue, the same being at the corner of Court street and Dexter avenue, and the residence on the west side of Root street between Mildred and Root streets and the plank road north of an- adjoining the 14 residence of said Sallie G. Thorington, in said city of Montgomery:

Now, if the said Sallie G. Thorington and her sureties or either of them shall pay all damages and costs caused to any one by the injunction if wrongful or if dissolved, then this obligation to be void; otherwise to remain in full force.

Witness our hands and seals this 25th day of January, 1886.

SALLIE G. THORINGTON. [SEAL.]
MARY E. WINTER. [SEAL.]
MARY L. THORINGTON. [SEAL.]
H. C. WEBER. [SEAL.]

Approved this 25th day of January, 1886.

V. M. ELMORE,
Register, &c.

Filed in office 25th day of January, 1886.

V. M. ELMORE,
Register, &c.

THE STATE OF ALABAMA, }
Montgomery County. }

To the city council of Montgomery:

Whereas one Sallie G. Thorington has exhibited her bill of complaint in the chancery court for the second district of the southern chancery division of said State, composed of the county of Montgomery, and has obtained from the Hon. John P. Hubbard, judge of the second judicial circuit of the State of Alabama, an order for the issuance of an injunction to enjoin you as hereinafter mentioned; and whereas the said Sallie G. Thorington has, in accordance with said order, entered into bond, with security, in the sum of two hundred dollars ($200.00), payable to and approved by the register of said chancery court and conditioned according to law: Now, therefore, you, the said city council of Montgomery, are hereby enjoined from selling under a decree of the chancery court of Montgomery county filed 15th day of August, 1885, the following-described lands, situated in the city of Montgomery, to wit: Lot twenty-five (25) by three hundred (300) feet at the east part of lots six (6) and
15 seven (7), square number four (4); the north part of lot one (1), south side of Dexter avenue; residence on west side of Root street between Mildred and Root streets, and the plank road north of and adjoining the residence of Mrs. Sallie G. Thorington; and this injunction you are required to obey under the penalties of the law until the further order of the court.

Witness my hand this 25th day of January, 1886.

V. M. ELMORE, *Register.*

To the sheriff of Montgomery county:

You are hereby commanded to execute this writ and return the same, with your endorsement thereon, to this court with all convenient speed.

Witness my hand this 25th day of January, 1886.

V. M. ELMORE, *Register.*

I hereby accept service of the within writ of injunction and waive copy of the same.

J. M. FALKNER,
City Attorney.

Answer of the City Council of Montgomery.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY. } In Chancery, at Montgomery.

This defendant, now and at all times saving to itself all manner of benefit, and not waiving the *money* imperfections, &c., in said bill of complaint contained, for answer thereto says:

1. Respondent admits the allegations in the first paragraph of the bill.

2. Respondent admits that on the 22nd day of February the city council of Montgomery filed its bill in the chancery court of Montgomery county, Alabama, against Joseph S. Winter and Mary
16 E. Winter, his wife, to enforce the payment of certain municipal tax claims and demands assessed by the city council for the several municipal tax years from 1873 to 1881, inclusive, but did not embrace the year 1882, as stated in the bill against certain plats of land in the city of Montgomery, and which were alleged in said bill to belong during the several years so named to the defendant Mary E. Winter; but respondent denies that said property so mentioned in said bill is properly described in Exhibit A to complainant's bill.

3. Respondent admits the allegations contained in the third paragraph of the bill.

4. Respondent admits the allegations in the fourth paragraph of the bill except the allegation that the property is properly described in Exhibit A to the bill, which allegation respondent denies.

5th. Respondent admits that it levied the tax for the year 1885, as stated in the 6th paragraph of the bill, and that the assessment was made against the property therein mentioned as the property of Mary E. Winter, and that said Mary E. Winter having failed to pay said tax, decrees were rendered by Hon. E. A. Graham, the recorder of the city of Montgomery, as stated in said paragraph, and that said property was advertised for sale and offered for sale, as stated in said paragraph, and that the same was bid off in the name of complainant at the sale thereof, and that a certificate of purchase was given in the name of complainant by the clerk of the city council for each piece of property so advertised and sold, but respondent avers that complainant did not in fact purchase said property, was not present at said sale, but that said property was bid off by Joseph S. Winter, the husband of Mary E. Winter and father of complainant, and that said Joseph S. Winter paid the amount so bid for each piece of said property, and, at his request, the clerk of the city council gave the certificates of purchase in the name of complainant, but delivered the same to said Joseph S. Winter; and
17 respondent denies that complainant furnished any money, directly or indirectly, or incurred any liability to any person for the money so used, but avers that complainant only permitted the use of her name by her father, Joseph S. Winter, in the said transaction; and respondent avers that the payment for the amount bid for each piece of property at said sale by the said Joseph S. Winter as aforesaid, was but the payment of the taxes, interest, and costs which had lawfully accrued against said several pieces of property and which the said J. S. Winter was legally bound to pay as the husband and trustee of the said Mary E. Winter, and that said pretended purchase by complainant was not in fact for or on account of complainant or in her interest, but was made in her name wholly with the view of delaying respondents in subjecting said property to the decree mentioned in the third paragraph of the bill; and respondent denies that complainant is the owner of said several certificates, or that any right of property accrued to her of the lots

therein mentioned, but avers that she holds the same, if at all, for Mary E. Winter and not for or on her own account.

7. Respondent denies the allegations contained in the 7th paragraph of the bill.

8. Respondent denies the allegations contained in the 8th paragraph of the bill.

9. Respondent denies the allegations contained in the 9th paragraph of the bill, and respondent avers that after the filing of said bill in the chancery court, as alleged in the second paragraph of the bill, and during the pendency of said litigation and before the rendition of said decrees of the recorder of the city of Montgomery, as alleged in the 6th paragraph of the bill, the said J. S. and Mary E. Winter sold and conveyed all the property described in the said bill filed in said chancery court except the property which complainant claims to have purchased and which respondent is restrained from selling by the injunction issued in this case, and that the
18 said Mary E. Winter is no longer in possession or the owner of said property, and as to all of which complainant is fully informed; and respondent avers that if it is forced to subject said property other than that claimed to have been purchased by complainant to the payment of said decree of said chancery court it will be involved in litigation with the purchasers of said property and will be greatly hindered, inconvenienced, and delayed in the collection of the amount due upon said decree from the said Mary E. Winter.

And now, having fully answered said bill, respondent demurs thereto, and for cause of demurrer shows the following:

1. The bill shows that respondent had a lien upon all the property described in the bill filed in the chancery court by virtue of the decree rendered in said cause, and that whatever liens or interests were acquired by virtue of the decrees rendered by the recorder's court and the sales thereunder were subsequent and subordinate to the lien of respondent under said first-mentioned decree of which complainant had notice.

2. The bill shows a lien on said property at and before the sale of the property under the decrees rendered by the recorder, which said lien was of full force and effect and undischarged at the time of said sale.

3. The bill fails to show a sufficiency of other property liable to the satisfaction of respondent's decree in said chancery suit from which the amount due respondent could be made without subjecting the property alleged to have been purchased by complainant to the payment thereof.

4. The bill fails to show respondent will not be delayed or inconvenienced in the collection of its debt if the prayer of complainant's bill be granted.

5. For aught that appears in the bill respondent will be greatly inconvenienced in the collection of its debt should a decree be rendered in accordance with the prayer of the bill.

6. It is not alleged in the bill that complainant is a creditor of Mary E. Winter.

19 7. On the facts stated in the bill the complainant is not entitled to the relief prayed for.

And respondent, having fully answered, prays to be discharged with its reasonable costs, &c.

J. M. FALKNER,
Sol. for Respondent.

Motion by Complainant, April 14, 1890.

STATE OF ALABAMA,
Montgomery County.

In Chancery, at Montgomery.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY.

Motion is made by complainant, by leave of the court, to have the respondent bring into court by its proper *order* or to have otherwise produced in court the testimony taken by them heretofore and as named and *descended* in the affidavit hereto annexed, marked Exhibit A, and to which reference is respectfully craved, for the use by complainant in her own behalf in the said cause, or, if that may not be consistently and legally done, that reasonable opportunity be given complainant to further justify her case herein by allowing complainant reasonable opportunity to establish the said testimony so taken for use in complainant's behalf in this cause.

For the complainant and the motion.

ARRINGTON & GRAHAM.
WINTER & WINTER.

"EXHIBIT A" TO MOTION.

STATE OF ALABAMA,
Montgomery County.

In Chancery, at Montgomery.

20 SALLIE G. THORINGTON
vs.
THE CITY COUNCIL OF MONTGOMERY.

J. S. Winter, of said State and county, being duly sworn, deposeth and saith that he is of the complainant's solicitors in the said cause; that some time before the trial of the same, in April, 1889, before his honor the chancellor, the solicitors for respondents obtained an order in this cause for the examination as witnesses in their behalf of this affiant and the complainant, Sallie G. Thorington and others, as disclosed by the records in the cause, with object, among other things, to show by the testimony of the said witnesses that the money paid respondents in settlement of complainant's purchase at the tax sale (set out in the complaint) of the property concerned in this suit

belonged to or was supplied by the owner of the property and the mother of complainant, to wit, Mrs. Mary E. Winter, and not by her, the said complainant.

II. That interrogatories were duly allowed and crossed by complainant and a commissioner, to wit, one Horace Stringfellow, Esq., appointed by the court to take said testimony, and that pursuant to the authority so decreed by the honorable court the aforesaid Sallie G. Thorington was duly examined under the said commission which issued to the said Stringfellow for her examination as a witness for use by either side in said premises, and that the said complainant, the said Sallie G. Thorington, testified before the said commissioner, among other things, that the money employed in the said purchase was her own; that it belonged to her, the said Sallie G. Thorington, in her own right in all respects, and that the bid made in her name for the property so concerned and before named was made by and under her previous request and authority for her by this affiant, and to enable him to pay for the property in event she should thereby become the purchaser of the same she, the said Sallie G. Thorington, supplied to this affiant, the said Winter, the money nec-
21 essary to pay for the same under said bid, and that the same was accordingly so paid by the said affiant and taken and received by respondent; that the last-named statement was made on information and belief, and that the purchase was in all respects *bona fide* (or statements to this effect) for account and risks in all respects of the said complainant, the said Sallie G. Thorington.

III. Affiant further says that he on the 11th day of April, 1890, just inquired of the clerk of the register of this hon'l court the present whereabouts of the papers so concerned and so entirely important to this cause, and that he was unable to get them; that the answer was that no return was within his knowledge ever made by the said Stringfellow of his doings under the authority of the said commission; but affiant avers that the same were suppressed or that he had reason to so believe; and affiant further says that complainant, assuming that due return would be or had been made of the testimony so taken as aforesaid, leaned upon it to show the true status of the facts, and has not therefore taken or caused to be taken any testimony whatever, and that as counsel for complainant he, the said affiant, cannot and does not advise going to trial in this cause without proof directly made in terms of the *bona fides* of the said purchase by the said complainant of the property concerned aforesaid, of the payment by her of the purchase-money through a duly authorized agent in that behalf, and that the money so paid was in fact and in truth hers as a matter within the actual knowledge of this affiant; and affiant further says that the matters and facts so suggested are susceptible of proof, and that if allowed the opportunity affiant expects to and will have due proof made of the same within reasonable time or within that reasonably necessary to effect the same, and that this application is made in good faith and not for the purpose of delay in the trial of this cause.

J. S. WINTER.

Sworn to and subscribed before me this the 14th day of April, 1890.

V. M. ELMORE, *Register.*

Filed April 14, 1890.

V. M. ELMORE, *Register.*

22 *Motion to Publish Testimony.*

In Chancery, at Montgomery.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY.

Motion is made in this case to publish testimony.

J. M. FALKNER,
W. A. GUNTER,
Sol'rs for Resp't.

Notice of Testimony.

In Chancery, at Montgomery, Alabama.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY.

Cause submitted for final decree on pleadings and testimony as noted by the register.

Complainants, being called, offers the following testimony, to wit:

1st. Original bill and exhibits.

2nd. The certificates of R. B. Snodgrass, clerk of the city council of Montgomery.

3rd. Objections of the complainant to the testimony of the witnesses, Knabe, Semple, and Gallagher.

4th. Complainant submits her objections to the testimony of the witnesses, Knabe, Semple, and Gallagher.

Defendant, being also called, offers the following testimony, to wit:

1st. The deposition of G. A. Knabe.

2nd. The deposition of James Gallagher.

3rd. The deposition of R. B. Snodgrass.

4th. The deposition of Henry C. Semple.

Filed in office 15th day of October, 1890.

V. M. ELMORE,
Register, &c.

23 In Chancery, at Montgomery, Alabama.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY.

Objections to Testimony of Defendant, The City Council of Montgomery.

Complainant objects to *this* part of the testimony of the witness G. A. Knabe in answer to the 4th interrogatory, which testimony is in the following language, to wit, "I give rent notes for said store to J. S. Winter, trustee, and the notes have been made out in same way ever since October, 1887," on the following grounds:

1st. It is irrelevant to any issue in this cause.

2nd. It relates to matters which occurred since the filing of the original bill in this cause.

3rd. It is illegal.

4th. It does not appear that the complainant was a party to — cognizant of the matters to which it relates.

Complainant objects to that part of the testimony of the witness Gallagher in answer to the 4th interrogatory, in which he said, "The rent notes are made now, as they have been ever since I occupied my present shop, payable to J. S. Winter, trustee," upon the same grounds upon which she above objected to said testimony of said witness G. A. Knabe.

Complainant objects to that part of the testimony of the witness Semple in which he says that "in October, 1887, Brickell, Semple, and Gunter rented offices in the premises described from J. S. Winter, as trustee for Mary E. Winter, and gave notes for the rent, which were paid to them or their order for the time we occupied them," upon the same grounds upon which she above objected to said testimony of the witness Knabe.

ARRINGTON & GRAHAM AND
J. A. WINTER, *Sol'rs for Complainant.*

Filed by order of the court October 15th, 1890.
24 V. M. ELMORE, *Register.*

Deposition of G. A. Knabe.

Deposition of G. A. Knabe, witness sworn and examined under and by virtue of a commission issued out of the chancery court of Montgomery in a cause therein pending between Sallie G. Thorington, complainant, and The City Council of Montgomery, defendant.

G. A. KNABE, witness, being first duly sworn to speak the truth, the whole truth, and nothing but the truth, depose and say as follows:

Q. Where do you live, what is your business, and how long have you lived where you do now?

A. I reside in the city of Montgomery and have lived here for

three years and three months, and my business is that of druggist and have been such for the whole time of my residence here.

3 Q. Do you occupy the store at the corner of Court and Dexter avenue, known as Winter's corner and mentioned in the bill in this cause as the northern part of lot one, on the south side of Market street, in the city of Montgomery? How long have you occupied it and in what way? And, if you say as a store, state what rent you pay and about what proportion of the premises you occupy. How many stores are there on the premises besides the one you occupy, and how many stores are there in the building on said premises?

A. I occupy the store inquired about, on the corner of Court street and Dexter avenue. I have occupied said store three years, using it as a drug store and paying as rent therefor $1,600 per annum. I occupy the corner store, about twenty feet front on Court street, and I occupy the whole of the cellar. Besides the store I occupy there are three others, one occupied by James Gallagher, one by Meertief, and one by Gentile.

4 Q. From whom do you rent or lease and to whom are your rent notes payable and how long *as* has it been so? About what, in your opinion, is the rent of the whole of said premises per annum? Give your best judgment.

25 A. I give rent notes for the said store to J. S. Winter, trustee, and the notes have been made out in the same way ever since October, 1887. Before that time, I think, the rent notes were made in the same way, but I do not know, as I rented as a subtenant of J. R. Jordan & Co. I do not know what is the annual tent of the whole of said premises. I have heard that Gallagher paid $1,200.00 per annum and Mertief $600.00. I know nothing of my own knowledge except the rent of my own store is $1,600.00 per annum.

Deposition of James Gallagher.

JAMES GALLAGHER, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say:

1 Q. Where do you live, what is your business, and how long have you lived where you do *not?*

A. I reside in the city of Montgomery, Alabama, and have done so for last fifteen years; my present business is that of real-estate agent and proprietor of a barber shop.

3 Q. Do you occupy the store at the corner of Court and Dexter avenue, known as Winter's corner and mentioned in the bill in this case as northern part of lot one, on south side of Market street, in the city of Montgomery? How long have you occupied it and in what way? And, if you say as a store, state what rent you pau and about proportion of the premises you occupy. How many stores on the premises besides the one you occupy, and how many stores are there in the building on said premises?

A. I occupy No. 4 as a barber shop; said shop fronts twenty feet on Dexter avenue and runs back about sixty feet, and it forms a

part of what is known and called the Winter building. Besides the store I occupy there is one occupied by one Meertief, one occupied by G. A. Knabe, all on Dexter avenue, and two small stores on Court street, occupied by Joseph Gentile, and one by a man named Hogarty. I have occupied a portion of the building for about fifteen years, and for the last ten years have occupied the store I now occupy. I occupied it as a tenant the whole time, using it for a barber shop. I pay $1,200.00 per annum and for about last three years have paid same rent. It is a three-story building.

4 Q. From whom do you rent or lease and to whom are
26 your rent notes payable and how long has it been so? About what, in your opinion, is the rent of the whole of said premises per annum? Give your best judgment.

A. I made all my arrangements about rent of my shop with Col. J. S. Winter. The rent notes are made now, as they have been since I occupied my present shop, payable to J. S. Winter, trustee. The rent of the whole premises is about $5,000.00 per annum.

Deposition of R. B. Snodgrass.

R. B. SNODGRASS, being then duly sworn to speak the whole truth, the truth, and nothing but the truth, on oath doth say:

Q. Where do you live, what is your business, and how long have you lived where you now do?

A. I reside in the city of Montgomery, Alabama, and my business is clerk of the city council of Montgomery and have been such for the past fourteen years. I have lived in said city for about thirty-three years.

2 Q. If you know anything about the sale made by the respondent of the property mentioned in the bill for taxes at which the complainant was reported as the purchaser state all that you know of the following particulars:

1st. When said sale was made.

2nd. Who actually bid for said property at said sale and whose was the highest bid?

3rd. If you say J. S. Winter was the actual bidder state all the circumstances connected with his bidding and the way in which and how he gave in the name of the purchaser at such sale. Did he do it openly and loudly or secretly or in a law tone, &c.? Give all the particulars.

4. Who paid the money for such bids? Who paid the money for the certificates of purchase and how was it paid and to whom?

5. What relation does J. S. Winter sustain to complainant and to Mary E. Winter?

6. Who has been and still is the trustee of Mary E. Winter?

7. State any facts within your knowledge showing or tending to show that such said purchase of said property at tax sale the said J. S. Winter has continued to hold and manage the same as
27 trustee for Mary E. Winter. About what is the value of the

property alleged in the bill in this case to have been brought by Sallie G. Thorington in 1885 at tax sale?

A. I do know of the sale enquired of; I was at that time clerk of the city council. Said sale was made in November 30th, 1885. Joseph S. Winter actually bid at said sale and his was the highest bid. He was standing quite near to me and his bid was made in a rather quiet and low tone, and after the bid was accepted I asked him in whose name the property should be knocked off, and he said also in a low tone to Mrs. Sallie G. Thorington. J. S. Winter, after making his bid, said to me that he was ready to make the payment if I would walk over to office of Moses Bros. We then walked over to Moses Bros.' office and he pulled out a roll of money and offered to pay me. I told him I could not give him a receipt there, but would have to do so at my office. We then came to my office; he paid the amount of the bid out of money drawn by him from his pocket and I gave him a certificate of purchase made out in the name of Mrs. Sallie G. Thorington. J. S. Winter is the father of complainant and the husband of Mary E. Winter. To the best of my information, Joseph S. Winter is now, and has been for some time past, the trustee of said Mary E. Winter. I have no personal knowledge of any facts tending to show that said Joseph S. Winter controls said property as trustee for said Mary E. Winter or otherwise. The assessed value of said property is, and was at time of sale, about $31,500.00. The real value of the property is, to best of my judgment, about $50,000.00. The amount of taxes due at said time of said sale was $393.01, and that was the amount of the bid of said J. S. Winter.

Deposition of H. C. Semple.

H. C. SEMPLE, witness, being next duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

Q. If you know anything of J. S. Winter as trustee and Mary E. Winter exercising control over the property at the corner of Court and Dexter avenue since 1885, state what you know about the same and how you know it. About what is the cash value of the
28 property mentioned in the bill in this case as having been bought by Sallie G. Thorington at tax sale in 1885?

J. M. FALKNER,
Sol. for Respondent.

A. In October, 1887, Brickell, Semple, and Gunter rented offices in the premises described from J. S. Winter, as trustee for Mary Winter, and Mary E. Winter and gave notes for rent, which were paid to them or their order for the time we occupied them. The premises are, I suppose, worth fifty thousand dollars. I refer to the premises at the corner of Court street and Dexter avenue, known as the winter corner.

HENRY C. SEMPLE.

Published by order of court and filed in office Oct. 15, 1890.

V. M. ELMORE, *Register.*

Motion by Compl't. Filed Oct. 16, 1890.

STATE OF ALABAMA,
Montgomery County.

In Chancery, at Montgomery.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY.

The complainant in the cause so above stated respectfully moves the court for its order setting aside the submission made of the said cause on yesterday and which still pends as far as may be necessary to the court, consideration of and judgment upon *and for its consideration upon and judgment upon* the motion made at the last term of this honl. court, and filed on the — day of April of the said term, and to which reference is hereby accordingly made, and in support of the said motion begs to append thereto and as a part thereof the affidavit annexed, marked Exhibit A.

29 For the motion, ARRINGTON & GRAHAM,
WINTER & WINTER,
Solicitors for Complainant.

EXHIBIT A.

STATE OF ALABAMA,
Montgomery County.

In Chancery, at Montgomery.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY.

STATE OF ALABAMA,
Montgomery County, } *ss:*

J. S. Winter, of said State and county, being duly sworn, deposeth and saith that he is of the complainant's counsel in the said cause and has been since the inception of the same; that as such counsel he has, in point of fact, looked after the details more, perhaps, than any other of the complainant's counsel therein, and accordingly he was, perhaps, better informed as to these details; that at the last term of this honl. court it happened that when the case was reached on its appointed call he, the said affiant, was the only solicitor of either side who responded to the call and the only one present at said call, and that while expecting and intending to argue the motion filed by complainant on the 14th day of April and referred to in the motion of which this affidavit is a part on the said call he was cut off by his honor's prompt remark addressed to this affiant on the failure of the opposite side to answer as their names were called:

"There being no one here to represent the respondent, the case is with the complainant, and I will make whatever order her counsel may suggest;" that instead of making the submission practicable at such disadvantage to the respondent affiant simply suggested, in reply, a continuance of the cause, which was accordingly granted by his honor the chancellor, and thus no advantage was taken of opposing counsel's absence; that at such
30 time affiant had been quite unwell for several days and had, indeed, been and was under the treatment of a physician, and was accordingly forced to return at once home, where it soon became evident that he was laboring under what subsequently became a severe attack of typhoid fever; that it continued without interregnum for a period of 43 days, and that after the lapse of just or about three months only was he enabled to reach or be carried to the railroad as a means of getting benefit of the change of locality deemed necessary by his medical advisers to his ultimate recovery, and that on the night of the 14th of October instant only did he reach the city, and that in coming he came only to attend the trial of the cause herein, while advised against this return by medical advisers, protesting that he was and is still too feeble and otherwise disqualified to take part therein; that, exhausted by the railroad trip of about 300 miles necessary to his return on the said 14th instant, he reached the court-room at 9.50 o'clock a. m. of said day, while the case had been set the previous week at 10 o'clock a. m. of the 15th, yesterday, to find the testimony published, and that, for reasons best known, perhaps, to respondent, this did not include the testimony of the complainant, Mrs. S. G. Thorington, referred to in the affidavit of the 14th of April last, 1890, and that the said publication was therefore without opportunity to call up and have disposed of the motion so named.

That affiant filed said motion, according to his best recollection and so accordingly says, without the knowledge, as it happened, of the associate counsel, and had himself for the time forgotten, in his necessarily clouded condition under the facts, that he had in fact made it, and accordingly pressed the court, when informed of the publication and submission of yesterday aforesaid, to be allowed to write out a motion having a like object and of like effect, which was refused on the ground that it should have been made earlier if intended for use at this term of the court, on account, in other words,
of the seeming laches of complainant in not having made it
31 earlier in the term, affiant submitting, however, that there was after all no laches on the facts in respondent's position to the premises and the motion necessary to get for complainant advantage of the testimony named in affiant's affidavit of April 14, 1890, aforesaid.

And affiant further says that he had no opportunity before the case was called for the necessary conference with his associate counsel therein, Col. Arrington, even had he been mentally and physically equal to it, as he in fact was not; that the entire proceedings transpired in such rapid way as to debar his recollecting the incidents of the case at the last term of the court, and that in his

belief he will, if allowed the necessary time in that behalf, be enabled to promptly prove by other witnesses the facts generally set out in the affidavit aforesaid filed on the 14th of April last, as aforesaid, and as of particular bearing on the case that included to which the complainant testified before the commissioner, Horace Stringfellow, aforesaid, to wit, that the money employed in the said purchase was her own; that it belonged to her, the said Sallie G., in her own right in all respects, and that the bid made in her name for the property concerned was made by and under her previous request and authority for her by this affiant; and further deponent saith not.

J. S. WINTER.

Sworn to and subscribed before me this the 16th day of October, anno Domini 1890.

V. M. ELMORE, *Register.*

Filed in office October 16th, 1890.

V. M. ELMORE, *Register.*

In Chancery, at Montgomery, Alabama.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY.

32 October term, 1890.

The complainant after the argument of this cause had progressed to the last speech to be made by J. S. Winter, the counsel and father of complainant, and the submission of the cause had been made, said J. S. Winter interposed for complainant an application that the submission be set aside in order that he might submit a motion made at the last term of the court, which was filed by the register but was not submitted to the court. This motion was filed by the register and at the April term of the court and which was never submitted to the court or acted upon was that the court should instruct the commisssioner, Horace Stringfellow, to return into court how he has taken or acted under a commission issued to him to take the deposition of Mrs. Mary E. Winter and of complainant at the instance of defendant upon interrogatories filed by defendant and to return the deposition of such witnesses or either of them which he had taken.

Upon examination of the facts in this cause I find that at a former time J. S. Winter had asked the court to instruct the commissioner to return said deposition of M. E. Winter to him and to return the commission to the court as having been improperly issued. Upon a hearing of the application of J. S. Winter the court directed the commissioner to take whatever action in the matter he might choose, either to destroy said deposition or retain it, but in no event to permit either party to this suit to examine it. It was held that the deposition had been taken improperly because no commission

had been properly issued, and that as Mr. Stringfellow had acted without legal authority in taking the deposition it was the right of Mr. Winter, representing the complainant, to ask the court that the deposition should not be subjected to the scrutiny of defendant's counsel. The order which I made was verbal and was made at Mr. Winter's suggestion, but was a little different from his request. His request was that I direct the commissioner to return the deposition to the witness or to himself, but I made the order that he
33 keep the deposition secret from all parties to the suit or destroy it as he desired.

If this deposition was now before the court it could not be used for any purpose unless in the meantime the deposition of the witness had subsequently baan taken and the deposition taken by Mr. Stringfellow should be offered to contradict any of the statements made therein; but I append hereto a statement of Mr. Stringfellow that the deposition had been destroyed. It could, therefore, do no good to any person now to take any action therein at this time. It cannot be disputed that if any one desired to take action in the matter to get the deposition of either of these witnesses there has been ample time to have done so. The submission in this cause was made without any application for a continuance in order to get the deposition of these witnesses, one of whom is the complainant. The complainant has never taken any steps during the time this case has been continued from year to year to get her own or her mother's deposition in the case. Under these circumstances the motion to set aside the submission on that ground is denied.

JNO. A. FOSTER, *Chancellor.*

Statement of H. Stringfellow.

In Chancery, at Montgomery, Ala.

In Re CITY COUNCIL OF MONTGOMERY
v.
SALLIE G. THORINGTON.

Commission was issued in the above-entitled cause to me, Horace Stringfellow, for the taking of the deposition of Mary E. Winter and others. I took the deposition of Mrs. Winter only. For some cause, upon the objection of Mr. J. S. Winter made in open court, the chancellor ruled that the commission should not have been issued, and that I as commissioner should proceed no further under it. In consequence I made no return of the commission, but my recollection is under the instruction of the court not to disclose the testimony taken to solicitors either for complainant or
34 respondent. I destroyed the same.

Oct. 18th, 1890.

HORACE STRINGFELLOW,
Commissioner.

Final Decree.

In Chancery, at Montgomery, Alabama. In Vacation.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY.

This cause was submitted for decree at the last term of the court on the pleadings and testimony and objections to testimony as shown by the note of testimony and submission on file and was held for consideration in vacation; and now, on consideration, it is ordered, adjudged, and decreed that complainant is not entitled to relief, and that the injunction heretofore issued in this cause be, and the same is hereby, overruled and the bill of complaint dismissed out of this court.

Let complainant pay the costs of this suit, for which execution may issue.

JNO. A. FOSTER, *Chancellor.*

Clayton, Ala., Dec. 1, 1890.

Opinion.

This transaction was a gift or it was a fraud. If there was no purpose to hide out the property for a nominal consideration from the debts due the defendant, then it was the purpose of Col. Winter and his wife to make a gift of the property worth $50,000.00 (it is said) to their daughter. It is not at all credible that Col. Winter should have been Mrs. Thorington's agent to buy this property in at tax sale unless he intended either to make her a present of the property subject to whatever liens was on it or to hide it out in her name against these encumbrances for his benefit. It may be that he thought his daughter would not assert the title which he was placing in her name, and that the beneficiary would not be changed.

35 I have not been able to imagine any other purpose or intention which could have actuated Col. Winter in buying in the property as he did, no matter whose money paid for it, but the purpose to make a donation of this valuable property to his daughter or else to use this tax sale as a means to avoid the payment of defendant's debt.

In speaking of this matter as a fraud I wish it to be understood that I do not make any criticism upon Col. Winter's character in the matter. It is very evident that for many years he has resisted the payment of defendant's debt, and that he does not think there is anything but a legal obligation to pay it. He will not be censured therefore personally for resorting to every legal means in his reach to avoid the payment of what he considers an unjust claim against him. The very fact that he has resisted so many years in the courts the payment of these claims may be regarded as a circumstance

tending to show that in order to avoid the payment of such a claim he resorted to the method of putting the title of the property in his daughter.

I will not consider the question whether or not this transaction was a gift of at least $49,600.00 worth of property to complainant subject to defendant's debt. It may be that Col. Winter resorted to the tax sale as a means to make a gift to her so she could hold the property discharged of the lien of defendant's decree. If this was intended as a gift to her she can only take it in subordination to defendant's decree. It is a well-settled proposition that a man cannot give away his property to avoid the payment of his debts. A voluntary gift of property will take full force and effect as between the parties and as against all the world except the donor's creditors. It may be true that in such case as this Col. Winter could at the time fixed by law have redeemed the property and thus avoided the effect of the deed which he procured the tax collector to make to his daughter, and thus reinvest the title in him. If he had done so he would hold the property
36 subject to the debt of defendant. There is no claim that he has done so. The title created by the deed which Col. Winter procured to be made to his daughter must be considered as still in her, and Col. Winter is her active solicitor in this cause, insisting that the effect of said deed was forever to divest the title out of him and his wife and vest it in their daughter. He was certainly willing, and still seems desirious, that property worth $50,000.00 shall be permanently transferred to his daughter for a consideration of less than $50.000. He was the active agent in procuring this transfer from himself and wife to complainant and is seeking, as her solicitor, to perpetuate the transfer. If there was no purpose whatever on the part of the parties to this transaction to avoid defendant's debt, and if Mrs. Thorington contributed her own money to make the purchase at the tax collector's sale, I hold that it was a gift by them to her as is still subject to defendant's debt.

I will not discuss further whether this was a fraudulent transaction. I am of the opinion from the testimony that defendants have shown it to have been primarily for the purpose of avoiding the claims of defendant. There is no proof tending to show whether the money used was the money of Mrs. Thorington or not. In the absence of such proof I am bound to conclude that it was Mrs. Thorington's money which was so used, but when we consider the fact as proved that Col. Winter, as trustee of Mary E. Winter or simply as trustee, has been renting the property out and collecting the rents as heretofore, and that she has made no effort to get possession of it from her father or to assert her claim to the rents, it seems to me that the conclusion is irresistable that Col. Winter has used his daughter as a means to avoid the payment of a debt which he considers unjust and inequitable, but which the courts have pronounced to be a legal claim and encumbrance on the property.

The objections to testimony are not well taken. It is certainly competent for defendant to show that complainant has permitted

her father, the trustee of her mother, to continue as such
37 trustee to control and retain the property so long without regard to her interests in it, but if this were otherwise I could not notice these objections to the testimony for the reason that they are not presented in the manner required by the rule as laid down in Birford *v.* Dement, 82 Ala.

It may be remarked that whether we consider the deed as a gift *bona fide* or a fraudulent conveyance the title has vested in Mrs. Thorington, and she is entitled to all the property except what may be necessary to pay off this encumbrance. In executing the decree which has been enjoined in this case it will not be necessary to state this to the register. The deed from the tax collector to Mrs. Thorington made and recorded since the rendition of the decree is notice to him and all the world that Col. Winter has no longer any interest in this property, but that it is now the property of Mrs. Thorington, subject to defendant's encumbrance.

It will not be denied that a sale for taxes as well as a sale under execution or under any legal process may be used as a means to consummate a fraud, but such sales are good as between the parties and affect only those against whom the fraud was directed. Therefore, whether there was a fraud or a *bona fide* gift, the property is now the property of Mrs. Thorington as against every one except the parties to this suit.

Received from express Co. and filed in office Dec. 2nd, 1890.
V. M. ELMORE, *Register.*

STATE OF ALABAMA, }
Montgomery County. }

In Chancery, at Montgomery.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY. } Case No. 1640.

38 *Application for Appeal.*

To V. M. Elmore, Esq., register of the said court:

And now comes the complainant aforesaid, the said Sallie G. Thorington, by solicitors, in the said cause and prays an appeal to the present term of the supreme court and to the first Monday after twenty days herefrom of the said term from the decree rendered in the said cause by the chancellor of the said court, the Honl. Jno. A. Foster, and now and herewith offers a bond for approval by the register for the amount of five hundred dollars, with the sureties thereon shown, and further asks that the said bond may on its approval by the register operate to supersede the said decree.

This the 12th day of December, anno Domini eighteen hundred and ninety-two.

ARRINGTON & GRAHAM.
WINTER & WINTER.

Supersedeas Bond.

STATE OF ALABAMA,
Montgomery County.

In Chancery, at Montgomery.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY. } Case No. 1640.

Know all men by these presents that we, Sallie G. Thorington, the complainant aforesaid; Mary E. Winter, joined by her husband, Joseph Winter; Willis L. Chandler, and Wm. T. Chandler, are held and firmly bound unto the said city council of Montgomery in the just sum of five hundred dollars; for the payment of which, well and truly to be made and done, we jointly and severally bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

39 Sealed with our seals and dated this the 12th day of December, 1890.

The condition of this obligation is such that whereas the above-bounden Sallie G. Thorington has applied for and obtained an appeal to the supreme court and to the first Monday after twenty days *heretofore* of the present term of said court to supersede and reverse a decree in the said chancery court rendered in said cause on the 1st day of December (anno Domini 1890) instant in favor of the said city council of Montgomery and against the said Sallie G. Thorington: Now, if the said Sallie G. Thorington shall prosecute such appeal to effect and pay all such decrees as may be adjudged against her, the said Sallie G., on such appeal and if she fail on such appeal shall pay all such costs and loss as any person may sustain by such appeal, then this obligation to be null and void; otherwise to remain in full force and effect.

SALLIE G. W. THORINGTON. [SEAL.]
MARY E. WINTER, [SEAL.]
Joined by her husband—
J. S. WINTER. [SEAL.]
WILLIS L. CHANDLER. [SEAL.]
WM. T. CHANDLER. [SEAL.]

Approved this the 15th day of December, 1890.

V. M. ELMORE, *Register.*

Notice of Appeal.

In Chancery, at Montgomery.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY. } No. 1640.

To W. A. Gunter and J. M. Falkner, solicitors for defendant:

Whereas the complainant, Sallie G. Thorington, has prayed for and obtained an appeal to the supreme court of the State of Alabama from the decree rendered in the above-state- cause by the chancery court for the 6th district of the southern chancery division of the State of Alabama on the 1st day of December, 1890, and has given bond in the sum of five hundred dollars, superseding said decree, said appeal being made returnable January 5th, 1891:

Now, therefore, you are hereby cited to appear at the supreme court of the State of Alabama January 5th, 1891, and defend on said appeal if you think proper so to do.

Witness my hand this 19th day of December, 1890.

V. M. ELMORE, *Register.*

Received in office Dec. 19th, 1890.

W. D. WESCOTT, *Sh'ff.*

Executed by serving a copy of the within notice of appeal by leaving copies at the office of J. M. Falkner and W. A. Gunter this 19th Dec., 1890.

W. D. WESCOTT, *Sh'ff.*
W. B. W., *D. S.*

Certificate of Record.

STATE OF ALABAMA,
Montgomery County. }

I, V. M. Elmore, register in chancery for county of Montgomery, and by law the keeper and custodian of the books, records, and papers of said court, hereby certify that the above and foregoing pages, numbered from one (1) to forty-eight (48), both inclusive, contain a full, true, complete, and correct copy of the record and proceedings of said court in a cause lately pending therein, in which Sallie G. Thorington was complainant and The City Council o ¦Montgomery was defendant, as the same appears of record and on file in my office as such register.

Witness my hand this the 24th day of January, A. D. 1891.

V. M. ELMORE,
Register in Chancery.

41 *Certificate of Appeal.*

STATE OF ALABAMA, }
Montgomery County. }

I, V. M. Elmore, register in chancery in and for said State and county, hereby certify that from the decree rendered in the cause lately pending in said court in which Sallie G. Thorington was complainant and The City Council of Montgomery was defendant, on the 1st day of December, 1890, the said complainant, Sallie G. Thorington, has applied for and obtained an appeal returnable to the supreme court of the State on the 5th day of January, A. D. 1891, and also for a supersedeas of said decree, which was granted, and that Mary E. Winter, joined by her husband, Joseph S. Winter, Willis L. Chandler, and Wm. T. Chandler are sureties on said appeal and supersedeas bond.

Witness my hand this the 24th day of January, A. D. 1891.

V. M. ELMORE,
Register in Chancery.

Filed February 4th, 1891.

JOHN W. A. SANFORD, *Clerk.*

42 *Assignments of Errors.*

In the Supreme Court of Alabama, November Term, 1890.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY. } 3 Division, 420.

Now comes the appellant, by her attorneys, and says manifest error hath intervened to her injury in the court below and makes the following assignment of error:

1st. The court below erred in rendering the final decree made by it dismissing appellant's bill and in overruling objections to testimony.

ARRINGTON & GRAHAM AND T. H. WATTS,
Att'ys for Appellant.

Appellees move to affirm this case for want of proper assignment of errors.

J. M. FALKNER,
W. A. GUNTER,
For Appellees.

43 Supreme Court.

MAY 20, 1891.

The court met pursuant to adjournment.
Present: All the justices.

Montgomery Chancery Court.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY. } 3 Division, 420.

Comes the parties, by attorneys, and submit this cause on briefs for decision.

Supreme Court.

DECEMBER 16TH, 1891.

The court met pursuant to adjournment.
Present: All the justices.

Montgomery Chancery Court.

SALLIE G. THORINGTON
v.
THE CITY COUNCIL OF MONTGOMERY. } 3 Division, 420.

Comes the parties, by attorneys, and, the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of said chancery court there is no error. It is therefore considered that the decree of said court be in all things affirmed. It is also considered that the appellant and Mary E. Winter, J. S. Winter, Willis Chandler, and William T. Chandler, sureties on the appeal bond, pay the costs of appeal in this court and in the chancery court.

Clopton, J., not sitting.

44 Supreme Court of Alabama, November Term, 1891–'92.

SALLIE G. THORINGTON
v.
CITY COUNCIL OF MONTGOMERY. } 3 Div., 420.

Appeal from Montgomery chancery court.

STONE, *C. J.:*

The present suit was instituted in January, 1886. It has been twice before this court. 82 Ala., 591, S. C.; 2 So. Rep., 513; 88 Ala., 548, S. C.; 7 So. Rep., 363. It grew out of the suit of Winter *v.* City Council of Montgomery, reported in 79 Ala., 481.

At the spring term, 1890, of the chancery court a motion was filed by complainant for an order to compel the respondent to produce in court the testimony of J. S. Winter and others alleged to have been taken by respondents, "and, if that may not be consistently and legally done, that reasonable opportunity be given complainant to further fortify her case herein by allowing complainant reasonable opportunity to establish the said testimony as taken for use in complainant's behalf in this cause." This motion was accompanied by an affidavit of J. S. Winter, in which he set forth

that the deposition of Sallie G. Thorington had been taken for respondent on interrogatories filed and crossed, and that in said deposition she had testified that the lots in controversy in this suit were purchased with her money, at her request, and in good faith. The affidavit further stated "that complainant, assuming that due return would be or had been made of the testimony so taken as aforesaid, leaned upon it to show the true status of the facts, and has not, therefore, taken or caused to be taken any testimony whatever, and, as counsel for complainant, he, the said affiant, cannot
45 and does not advise going to trial in the cause without proof, directly made in terms, of the *bona fides* of the said purchase by the said complainant of the property concerned as aforesaid—of the payment of the purchase-money through a duly authorized agent in that behalf—and that the money so paid was in fact and in truth hers is a matter within the actual knowledge of this affiant; and affiant further says that the matters and facts so suggested are susceptible of proof, and, if allowed the opportunity, affiant expects to and will have due proof made of the same within reasonable time," &c.

This motion and the accompanying affidavit were by the register marked filed April 14, 1890. The case was not tried at that term, but no entry was made of record showing that the cause was continued. Neither is it shown that any action was taken on the motion or that the attention of the court was called to it.

The next orders in this cause shown by the record were made at the October term, 1890. The first was an order of publication. Then follows an order of submission with a note of the testimony. These are dated October 15, 1890. On October 16, 1890, a motion was made by complainant, accompanied by an affidavit of J. S. Winter, to set aside the submission and grant to her further time to take testimony, by which she proposed to prove the purchase of the lots in good faith and with her money. This affidavit sets forth the long-protracted illness of affiant, one of plaintiff's counsel, which disabled him to prepare the case for trial. Two other solicitors, it appears, had prepared and filed the bill. It was signed alone by them and they join in the assignment of errors. The affidavit sets forth no reason why the testimony had not been procured by the other solicitors. The only excuse looking in this direction is the clause in the affidavit which asserts that J. S. Winter, the affiant, "has, in point of fact, looked after the details more, perhaps, than any other of complainant's counsel therein, and accordingly was, perhaps, better informed as to these details."

46 The chancellor responded to this motion and affidavit as follows:

"The complainant after the argument of this cause had progressed to the last speech to be made by J. S. Winter, the counsel and father of complainant, and the submission of the cause had been made, said J. S. Winter interposed for complainant an application that the submission be set aside in order that he might submit a motion made at the last term of the court which was filed by the register, but was not submitted to the court. This motion — was filed by the regis-

ter at the April term of the court, and which was never submitted to the court or acted upon, was that the court should instruct the commissioner, Horace Stringfellow, to return into court how he had taken or acted under a commission issued to him to take the deposition of Mrs. Mary E. Winter and of complainant at the instance of defendant upon interrogatories filed by defendant, and to return the deposition of such witnesses or either of them which he had taken.

"Upon examination of the facts in this cause I find that at a former term said J. S. Winter had asked the court to instruct the commissioner to return said deposition of M. E. Winter to him and to return the commission to the court as having been improperly issued. Upon a hearing of the application of J. S. Winter the court directed the commissioner to take whatever action in the matter he might choose, either to destroy said deposition or retain it, but in no event to permit either party to this suit to examine it. It was held that the deposition had been taken improperly because no commission had been properly issued, and that as Mr. Stringfellow had acted without legal authority in taking the deposition it was the right of Mr. Winter, representing the complainant, to ask the court that the said deposition should not be subjected to the scrutiny of defendant's counsel. The order which I made was verbal, and was made at Mr. Winter's suggestion, but was a little different
47 from his request. His request was that I direct the commissioner to return the deposition to the witness or to himself, but I made the order that he keep the deposition secret from all parties to the suit or destroy it as he desired.

"If this deposition was now before the court it could not be used for any purpose unless in the meantime the deposition of the witness had subsequently been taken and the deposition taken by Mr. Stringfellow that the deposition had been destroyed. It could therefore do no good to any person now to take any action therein at this time.

"It cannot be disputed that if any one desired to take action in the matter to get the deposition of either of these witnesses there has been ample time to have done so. The submisssion in this cause was made without any application for a continuance in order to get the deposition of these witnesses, one of whom is the complainant. The complainant has never taken any steps during the time this case has been continued from year to year to get her own or her mother's deposition in the case. Under these circumstances the motion to set aside the submission on that ground is denied."

It is manifest there is nothing in the foregoing which we can review. No ruling is shown to have been had or even asked on the motion of April, 1890, further than the indisputable fact that the cause was continued at that term. On what ground the continuance was granted is not shown, and the application made October 16, 1890, made as it was pending the trial, was addressed to the court's discretion, and we cannot revise it. In fact, motions for a continuance are never revisable. 3 Brick Dig., 404, §§ 1 *et seq.* It is but just to appellant's counsel that we should state the question we have been considering is neither discussed nor claimed in his

brief. We have considered it proper, however, that we should notice it in view of the remaining points to be considered.

48 The uncontradicted testimony is that when the lots were sold for one year's assessment of city taxes they were bid off by J. S. Winter, husband and trustee of Mary E. Winter, the owner against whom the assessment had been made. The price was the amount of the one year's taxes, a sum less than one per cent. of the proven value of the property and much less than one-tenth of the annual rental value. When asked who was the purchaser he answered Sallie G. Thorington. Sallie G. Thorihgton is the daughter of J. S. Winter and Mary E. Winter. It is fully proven that for years preceeding the tax sale J. S. Winter superintended the renting, taking rent notes payable to himself as trustee, and that he collected the rents. The proof is full also that since the tax sale there has been no change. He has continued to superintend the renting, still taking the rent notes payable to himself as trustee and still collecting the rent as before. If there has been any change in the possession or control of the property or the rentals there is no proof of it. It was clearly competent to prove this continued control of the property and its rents by J. S. Winter, the trustee of Mary E. Winter. The absence of visible change in the control and possession was and is a circumstance to be weighed in determining whether there was a real change in the ownership of the property. It is certainly unusual for real purchasers of property at public sale to permit it to remain without change in the hands of the original owner for near five years with no offer of proof explanatory of so wide a departure from business methods. Grouping the whole facts, the relationship of the parties, the insignificant sum for which such valuable property was sacrificed and no offer or attempt made to redeem it, the continued possession and control of the property by the trustee of the original owner, the absence of proof even that Mrs. Thorington furnished the money with which the purchase was made, we hold that a strong presumption is raised that the title to the property was collusively placed in Mrs. Thorington in

49 secret trust for Mary E. Winter, her mother, and that there is no real change in the beneficial ownership. There is no proof to overturn or weaken this presumption.

It is contended that the chancellor erred in not ordering the three lots not claimed by Mrs. Thorington to be first sold. If that were shown to be an error in this case we would correct it in this court.

It being shown, however, that there has been no change in the ownership of the property, but that all the lots, so far as the testimony informs us, still belong to the tax-payer, there is neither duty nor propriety in directing which lot or lots shall be first sold. Nothing is shown in the record bearing on the question of priority of burden.

Affirmed.

Clapton, J., not sitting.

50 Know all men by these presents, that we, Sallie G. Thorington, Lucy W. Lahey, Mary E. Winter, and Jno. Gindrat Winter, as sureties are held and firmly bound unto "The City Council of Montgomery" in the full and just sum of two thousand dollars to be paid to the said "The City Council of Montgomery" its certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 30th day of April, in the year of our Lord one thousand eight hundred and ninety-two (1892.)

Whereas, lately, at a certain term of the supreme court of Alabama, in a suit pending in said court, between Sallie G. Thorington, appellant, and "The City Council of Montgomery," appellee, a judgment was rendered against the said Sallie G. Thorington, and the said Sallie G. Thorington having obtained a writ of error and filed a copy therof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City Council of Montgomery citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, 1892.

Now the condition of the above obligation is such that if the said Sallie G. Thorington shall pro-ecute said writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

SALLIE G. THORINGTON. [SEAL.]
JOS. S. WINTER. [SEAL.]
JOHN GINDRAT WINTER. [SEAL.]
LUCY W. LAHEY. [SEAL.]
MARY E. WINTER. [SEAL.]

By consent of and joined by me—
JOS. S. WINTER. [SEAL.]

Signed, sealed, and delivered by Sallie G. Thorington in the presence of—
J. S. WINTER.

Signed, sealed, and delivered by Jos. S. Winter in each case in the presence of—
MARY E. NEWBY.

Signed, sealed, and delivered by Mary E. Winter, "by consent of and joined by (her husband) Jos. S. Winter," in the presence of—
MARY E. NEWBY.

Approved by —— —— May 2nd, 1892.

GEO. W. STONE,
C. J. Sup. C't of Ala.

51 THE STATE OF ALABAMA, }
Montgomery County. }

I, John W. A. Sanford, clerk of the supreme court of the State of Alabama, do hereby certify that the foregoing pages, numbered from 1 to 52, inclusive, contain a full and true and complete transcript of the record and proceedings of the said supreme court in the cause lately pending therein, in which Sallie G. Thorington was appellant and The City Council of Montgomery was appellee, and that the writ of error hereunto attached is the original writ issued, allowed, and filed in the office of the clerk of the said supreme court, and that the citation hereto attached was issued and return of execution of said citation filed in said office of the clerk of said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of the said supreme court, at the capitol, in the city of Montgomery, in the State of Alabama, on the eleventh day of May, A. D. eighteen hundred and ninety-two.

Seal of the Supreme Court of Alabama.

JOHN W. A. SANFORD,
Clerk of the Supreme Court of the State of Alabama.

52 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in a cause between Sallie G. Thorington, appellant, and "The City Council of Montgomery," appellee, wherein was drawn in question appellant's right under article V of the amended Constitution of the United States to have the testimony of her, the said Sallie G., which had been taken under a duly issued commission in that behalf, read in her behalf on the trial of the said cause, & the decision was against her right & claim to be so heard, a manifest error hath happened, to the great damage of the said Sallie G. Thorington, as by the record & proceedings in said cause appears, the application for rehearing was considered and overruled February 24, 1892, by the supreme — of Alabama, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court, Middle District of Alabama.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 26th day of April, in the year of our Lord one thousand eight hundred and ninety-two.

J. W. DIMMICK,
Clerk of the Circuit Court of the United States, Middle District of Alabama.

Allowed by—
GEO. W. STONE,
Chief Justice Sup. C't of Alabama.

[Endorsed:] Filed Mar. 2d, 1892. John W. A. Sanford, clerk.

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The City Council of Montgomery, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Alabama, wherein Sallie G. Thorington is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

This 4th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Issued by—

[Seal of the Supreme Court of Alabama.]

GEO. W. STONE,
Chief Justice of the Supreme Court of Alabama.

54 On this 4th day of May, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared before me, the subscriber, John Crommelin, mayor of the city of Montgomery, and makes oath that — signed the acceptance of service of the within citation, as the same appears endorsed on said citation.

Sworn to and subscribed the 4th day of May, A. D. 1892.

—— ——.

[Endorsed.]

Return filed May 7th, 1892.

JOHN W. A. SANFORD, *Clerk.*

I, John G. Crommelin, mayor of the city of Montgomery, hereby accept service of the within citation of appeal in the case of Sallie G. Thorington *vs.* The— Council of Montgomery, said appeal being taken by said Thorington as appellant against said City Council of

Montgomery as appellee from the supreme court of Alabama to the Supreme Court of the United States, & I waive any other or further citation or notice of said appeal.

Witness my hand this 4th May, 1892.

——— ———,

Mayor of the City of Montgomery.

2, 69, 332. Rece'd in office 4th May, 1892.

W. D. WESTCOTT, *Sh'ff.*

Executed by serving a copy of the within on John G. Crommelin, as mayor of the city of Montgomery, this the 4th of May, 1892.

W. D. WESTCOTT, *Sh'ff,*
By C. E. PARKS, *D. S.*

Endorsed on cover: Case No. 15,050. Alabama supreme court. Term No., 1080. Sallie G. Thorington, plaintiff in error, *vs.* The City Council of Montgomery. Filed June 6, 1892.

14711490

JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

No. 1080.

SALLIE G. THORINGTON

vs.

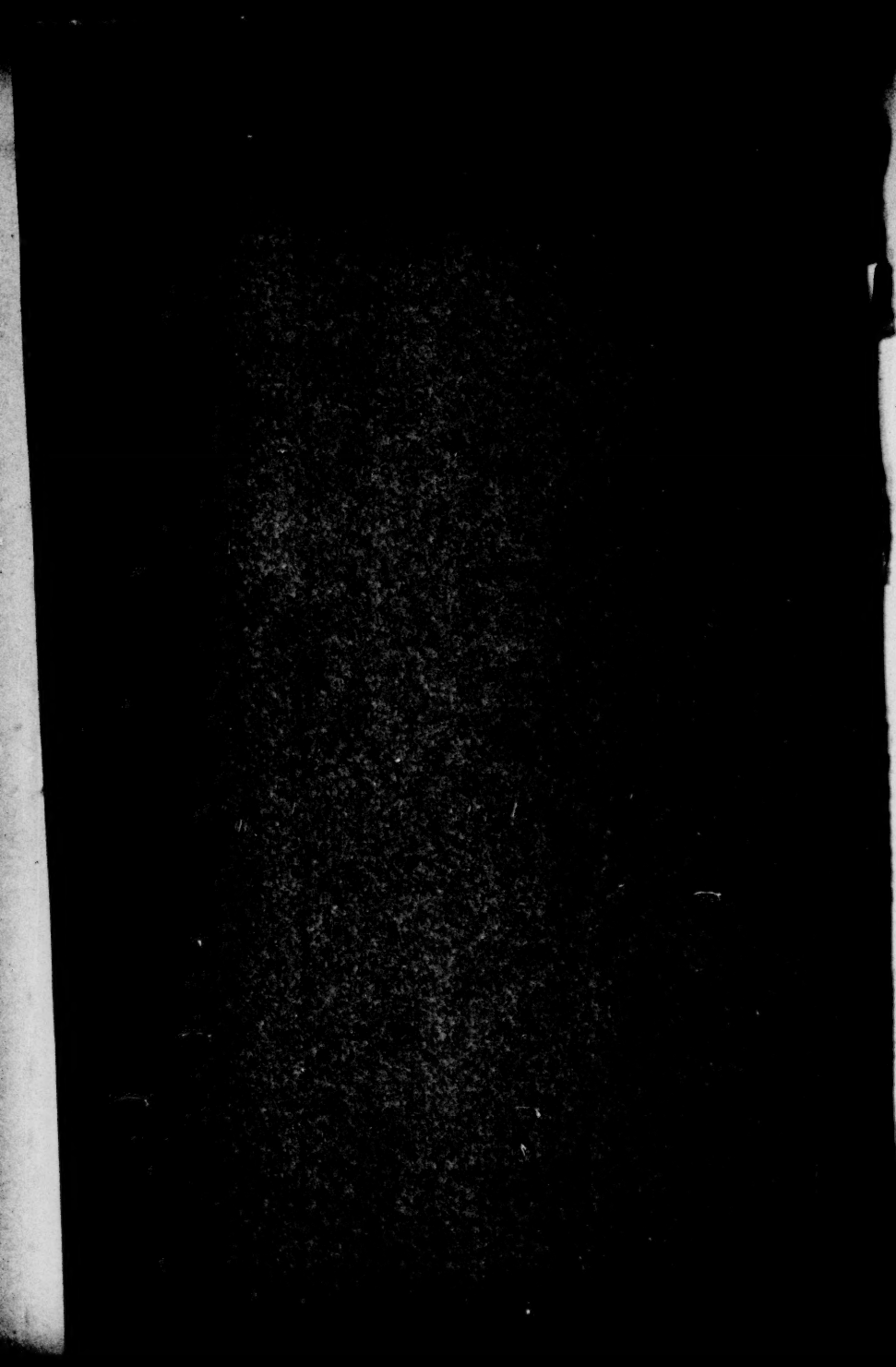
THE CITY COUNCIL OF MONTGOMERY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

MOTION TO DISMISS OR AFFIRM.

H. C. Semple,
W. Hallett Phillips,
Counsel for Defendant in Error.

Judd & Detweiler, Printers, Washington, D. C.



IN THE

Supreme Court of the United States.

No. 1080.

SALLIE G. THORINGTON

vs.

THE CITY COUNCIL OF MONTGOMERY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

MOTION TO DISMISS OR AFFIRM.

The defendant in error moves the Court to dismiss the writ of error in the above-entitled cause for want of a Federal question, and unites therewith a motion to affirm, on the ground that, even if the Court has jurisdiction, it is manifest that the writ of error is taken for delay only, and that the question on which the jurisdiction depends is frivolous.

H. C. SEMPLE,
W. HALLETT PHILLIPS,
Counsel for Defendant in Error.

Counsel for Plaintiff in Error.

Take notice that the above motion will be submitted three weeks from service hereof.

H. C. SEMPLE,
W. HALLETT PHILLIPS,
Counsel for Defendant in Error.

BRIEF ON MOTION.

It is seldom a case is brought to this Court from a State tribunal, on the ground of a Federal question, which has so little justification.

The matter involved is the collection of a tax by the city of Montgomery, which has been pending in judicial proceedings since 1882.

Under a bill filed by the city of Montgomery against Mary E. Winter and others, the chancery court of Montgomery, Alabama, in August, 1884, rendered a decree for taxes due for past years by Mrs. Winter, on six several lots of land in the city, the decree being for the sum of $4,444.42, charges and expenses. It declared a lien on said lots for the payment of the same, and ordered a sale if the amount was not paid as directed.

On appeal this decree was affirmed December 10, 1885, by the supreme court of the State.

(Winter *vs.* City Council, 79 Ala., 481.)

On October 10, 1885, under authority of law, certain of the said lots were ordered to be sold for unpaid delinquent taxes due for the year 1884.

Three of such lots were sold under the decree and bought in by Winter, the husband and trustee of Mary E. Winter, but the title was put in the name of Mrs. Thorington, the complainant in this cause, who was a daughter of Winter.

On January 25, 1886, Mrs. Thorington filed a bill in the Montgomery chancery court, seeking to enjoin a sale of these lots by the city, to satisfy the gross sum of unpaid taxes, as ascertained by the decree.

The main ground of the bill, was that the three lots which had not hitherto been sold by the city, should be sold for taxes, before the lots which had been purchased in complainant's name. This bill was sustained by the State supreme court, to the extent of holding that there might be equity in the bill.

(Thorington *vs.* Montgomery, 82 Ala., 592.)

On the cause being remanded to the chancery court, it was submitted for final decree on bill, answer, and exhibits. The injunction was dissolved and the bill dismissed.

On a second appeal this decree was reversed in 1889, on the ground that the effect of the purchase by Mrs. Thorington under the tax sale, was to cut off all prior liens for taxes for the years preceding 1884.

But the court observed, that if it was shown that the money with which the lots were purchased, was not really Mrs. Thorington's, or that there was collusion or secret trust for the tax-payer, then the doctrine of estoppel would not apply.

(Thorington *vs.* Montgomery, 88 Ala., 554.)

Accordingly, the case was again remanded to the chancery court.

There, on final hearing, the bill was dismissed. On the third appeal by Mrs. Thorington this decree was affirmed.

(Thorington *vs.* Montgomery, 10th Southern Reporter, 634.)

The present writ of error has been sued out to reverse the last judgment.

The record will be searched in vain for even a pretense of a Federal question, claimed or decided. The only sug-

gestion of such a question occurs in the writ of error, where it is said, "There was drawn in question appellant's right, under section 5 of the amended Constitution of the United States, to have the testimony of her, the said Sallie G., which had been taken under a duly issued commission in that behalf, read in her behalf on the trial of the said cause, and the decision was against her right and claim to be so heard." (R. Record, p. 35.)

There was no claim made in the proceedings in the chancery court [redacted] under the Constitution, nor does the supreme court of the State in its decision reported in the Record in any way refer to such a question. (R., p. 30.)

The absurd nature of the claim for the first time made here, is manifest. It has so frequently been decided that the prohibitions contained in the amendment to the Constitution referred to, are exclusively restrictions upon the Federal powers, that it is not to be wondered at that such a question was not presented for argument or decision in the court below. We await with interest the decision of counsel for plaintiff in error as to what particular portion of "article V of the amended Constitution of the United States" he will invoke.

Will it be the clause declaring no person shall be compelled in any criminal case to be a witness against himself or will resort be had to that palladium of our civil rights—the declaration that no person shall be deprived of life, liberty, or property without due process of law?

In fact, the whole controversy in the Alabama courts was as to the *bona fides* of the transaction by which the title to the property was transferred to Mrs. Thorington at the tax sale. It was contended by her that the purchase was made in good faith.

On the other hand, it was urged by the city that the purchase was a mere device to evade the indebtedness for taxes, and that the property was still chargeable with such indebtedness. The chancery court pronounced the transaction a fraud, and its judgment was in all respects affirmed by the State supreme court. The uncontradicted testimony was that the lots were sold for one year's assessment of city taxes, a sum less than one per cent. of their value and much less than one-fourteenth of the annual rental value. They were bid off by J. S. Winter, husband and trustee of Mary E. Winter, the owner against whom the assessment had been made. When asked who was the purchaser he answered, Sallie G. Thorington. She is the complainant and is the daughter of J. S. Winter and Mary E. Winter. It was fully shown that for years preceding the tax sale J. S. Winter had entire control of the property, and that since the sale there had been in this respect no change. The supreme court conclude as follows:

"Grouping the whole facts, the relationship of the parties, the insignificant sum for which such valuable property was sacrificed and no offer or attempt made to redeem it, the continued possession and control of the property by the trustee of the original owner, the absence of proof even that Mrs. Thorington furnished the money with which the purchase was made, we hold that a strong presumption is raised that the title to the property was collusively placed in Mrs. Thorington in secret trust for Mary E. Winter, her mother, and that there is no real change in the beneficial ownership. There is no proof to overturn or weaken this presumption. It is contended that the chancellor erred in not ordering the three lots not claimed by Mrs. Thorington to be first sold. If that were shown to be error in this case, we would correct it in this court. It being shown, however, that there has been no change in the ownership of the property, but that all the lots, so far as the testimony informs us, still belong to the tax-payer, there is neither duty nor propriety in direct-

ing which lot or lots shall be first sold. Nothing is shown in the record bearing on the question of priority of burden." (Record, p. 33.)

This decision on the merits of the controversy is not assailed here. The only complaint in regard to any part of the decision is founded on a matter of testimony, which was disposed of by the State supreme court, though not under any Federal aspect; and even as to the question of general law the court remarked it had neither been discussed nor claimed in the brief of appellant's counsel (Record, p. 32). The only assignment of error made in the supreme court of Alabama is that:

"The court below erred in rendering the final decree made by it dismissing appellant's bill and in overruling objections to testimony." (Record, p. 29.)

The supreme court say, as to the question of evidence which is now sought to be brought to the attention of this Court, that it was manifest that there was nothing which they could review; that no ruling was shown to have been had or even asked on the motion which the complainant had made, April, 1890, regarding the production of the testimony taken before the commissioner.

A continuance had been granted, but on what ground was not shown, and the application made October 16, 1890, pending the trial, was addressed to the court's discretion and was not reviewable. (Record, p. 32.)

The motion of complainant to have the testimony referred to produced, is found on page 13 of the Record, and attached thereto is the affidavit of J. S. Winter. Nothing was done with it, however, and the cause was submitted to the chancery court on the merits. It was then, as stated by the

supreme court of the State, that the complainant moved for an order setting aside the submission of the cause in order to obtain consideration of the motion which he had abandoned. In fact, it is shown that the reason why the particular testimony was not returned to the court was that, on motion of Winter himself, the court had instructed the commissioner to take such action as he might think proper regarding the deposition, but in no event to permit either party to the suit to examine it, inasmuch as the deposition had been improperly taken.

It is needless, however, to go further into this matter, relating, as it does, wholly to a matter of practice under State procedure, which addressed itself to the discretion of the court.

The decision of the matter did not draw in question any right the complainant has under the Constitution of the United States, and it is manifest that the only object of bringing the case here is delay. For that reason the judgment would have to be affirmed, even if the plaintiff in error could show a Federal question.

H. C. SEMPLE,
W. HALLETT PHILLIPS,
Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES,
FALL TERM, 1892.

From the Supreme Court of Alabama.

In the case of

SALLIE G. THORINGTON, Complainant and Appellant,

vs.

THE CITY COUNCIL OF MONTGOMERY

in the Chancery Court at Montgomery; and, here, on the petition for review, of the said complainant, Sallie G. Thorington.

BRIEF IN BEHALF OF THE PETITIONER, SALLIE G. THORINGTON.

POINTS:

This case is upon the assumption and claim that it appears from the records of the proceedings in the said Chancery Court, that the Complainant was there denied a hearing before said court in the cause so stated, contrary to the provisions of section 14 of the Federal Constitution, reading—"Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws;" the purpose and object of complainant's action in the court below, being to stay the respondent, City Council—(a constituent part of the said State of Alabama)—and thus the State, in its pending threat and purpose to subject, as

alleged in the complaint, the property concerned in the suit, to its demands for city taxes assessed and levied against yet another party;—while the transcript of the proceedings brought up, shows, that in the hearing of the cass instituted, as stated, *to prevent the so threatened wrong and injury*, the complainant *was manifestly without her constitutionally guaranteed opportunities before the court!*—trying the cause, as appears by the record, without allowing her the right and privilege—(in terms refused and denied)—of being heard in her own behalf, in respect to matters not only material to the issues raised by the pleadings, but even palpably *vital;*—and we submit—to go even further—in respect to matters that, duly weighed and properly considered, should and would have been unqualifiedly conclusive, indeed, as against her opponent in the case so on trial!

II. In support of this proposition and claim, it is respectfully submitted, that the incidents of the case, on its trial before the Chancellor, show, first, that on the return of the case from the Honorable Supreme Court of Alabama, the respondent, City Council—warned, by the decision and opinion against it, that, further testimony was necessary to its defense—please see Alabama reports, vol. , page —issued or had issued, interrogatories to the complainant, the said Sallie G., with object to prove—(as the Supreme Court, in its decision, aforesaid,—to repeat—notified the respondent *it must* do to succeed)—that her purchase was not "*bona fide;*"—and, thus, was a fraud on the respondent—getting the money, as the record shows, for the purchase concerned—keeping it without offer made to return it; and all this, too, in the face of the further fact that abundant other reality had been levied on to satisfy said claim, and was within easy reach and yet never sold or attempted to be—though its sale would have been of corresponding relief to the complainant, of course!

That these interrogatories were duly executed and—as appears *by the uncontroverted—and thus, virtually conceded affidavit* basing complainant's application to be allowed the use of the resulting testimony, on the trial;—that this testimony distictly set up and showed that the purchase was

undeniably, on the other hand, "*bona fide;*"—for her own account and risk, and paid for with her own money! That, however, the testimony so taken was not, at the trial of the cause, *among the papers in the case;*—that the respondents had not introduced it;—as they, of necessity, could not have, consistently, done.—and, that the complainant, on the other hand, moved the court to be allowed its use in complainant's own behalf;—she having crossed the interrogatories concerned;—while his Honor, the Chancellor, taking the papers for consideration and decision, finally refused to allow the production of the papers so applied for, and further refused to allow the testimony so elicited, to be *re-established*—as prayed—if its production were for any reason impracticable, by reason of its loss, misplacement, or, otherwise!

III. That the Chancellor, indeed, failed, for reasons that appear, to act, in point of fact, in the matter before him! that—and to go further—it seems plain, that, *he had no proper understanding, in point of fact, of the character of the motion before him!* That the version which his decision gives it, *is palpably contradicted by the record;* he, plainly, *taking it to be* a motion on the trial, and while the cause was on hearing, to continue the cause in order to allow complainant to take the wholly independent testimony of a third party, in respect to a wholly different matter, if his statement of the matter is to guide us;—and, with effect, it is surmised and submitted, to have the Supreme Court on appeal, follow the learned Chancellor's lead, if the Court please;—and so adopt his Honor's version of the motion before the court; though, wholly and unqualifiedly foreign to any and everything proposed or suggested by complainant's motion; and though, again, with all the effect, of course, to have, or that could have, followed, the refusal of the motion in fact before him, in terms, unequivocally denying the complainant the constitutionally guaranteed opportunities sought by the motion; and in respect to which, the Chancellor was without, we submit, any sort of discretion, contrary, again, to what would have been the power of the court on a motion, pending trial, "*to take further testimony;*"

as being always within the irreversable discretion of the court trying the case."

To repeat, the motion in the case, *presented by the Chancellor's opinion, and on which he acted and alone acted*, we respectfully submit, was, in respect to a matter addressing itself to the sound discretion of the Honorable Court under the facts; and its decision thereon, ordinarily, not reversable. In the case, *in fact, before the Chancellor*, however, as disclosed by the record—the motion was, *in point of fact*, and, to repeat, for the allowance of complainant's constitutional right to be heard as a witness, in effect, in her own cause and behalf, in respect to matter not only material, as shown by the record, but *conclusive* of the issues of the case before the court; and which was denied, though not to have been so treated under the constitutional interdiction before quoted.

IV. The case thus presented, is, we submit, clearly and fully sustained in its facts and incidents by the record of the proceedings so before referred to, while the rule, it will be conceded, is, that whether included in the points particularly discussed or raised by the counsel engaged in the cause, or otherwise, if, *on examination of the record as a whole*, it appears to this Honorable Court, that the facts thereby established were such as to raise a case of denial of complainant's constitutionally guaranteed rights, by the court trying the cause,, it will be judicially noticed by this Honorable Court, in determining, first, its jurisdiction in the premises; and, noticing it, for one purpose, the court, will, in the exercise and possession of its constitutionally conferred jurisdiction, go further, and settle the equities of the case *presented by the record, throughout;* and so finally dispose of it on its merits, as successors to the jurisdiction, before, in the State tribunals;

for, it was not a matter under the law of the case presented by the complaint, *of any concern whatever*, to the respondent, City Council, as to whether the complainant was acting as agent—as charged *contra*, in the answer—of her mother, or, as she alleges in her complaint, for herself!

That the particular facts of the case, in a word, distinguish it from the case raised by, or against the tax payer, *personally bound for the tax*, who buys at the sale of the property concerned, *whether directly or indirectly;*—as the law in *that* case, *infers* an intention and purpose to simply pay the (in that case, properly called) "*debt.*" While for further argument in this behalf, we beg to refer the court, if kindly permitted to do so, to complainant's brief and argument, on this point and others pertinent to this issue, in the Supreme Court of Alabama, on her motion to be re-heard in said cause, and which is hereto, by leave of this Honorable Court, respectfully appended.

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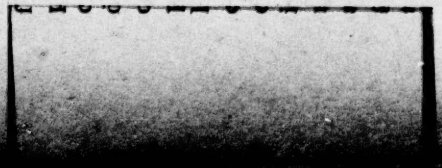

JURISDICTION.

I. If upon examination of the proceedings of proper consideration in the court below, it clearly appears that a right secured to him by the Federal Constitution, was relied on by the plaintiff in error, and, that being claimed by him, it was denied—the jurisdiction of this court at once attaches, unaffected by the fact that the State court is not shown to have erred in its judgment. Every thing necessary to confer jurisdiction, is the fact, that the question was in the case, and was decided adversely to the plaintiff in error.

II. Nor is it in any case necessary that the particular provision of the Constitution which the plaintiff in error says has been violated on its application to his case, should be contained in the pleadings.

If the record shows by express averment, or by necessary intendment, that the constitutional provision was considered or that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches; the true and rational rule being, that the court must be able to see *from the whole* record, that a certain provision of the Constitution, *was relied on by the party who brings the writ of error;* and, *that the right thus claimed* by him, *was denied.*

III. Testing the case at bar by these rules, it is apparent that the case is properly before this court, *and must be disposed of on its merits;* which it will be on the other hand, we assume conceded, is for reasons of unnecessary suggestion not to be (on principle) effected—(as evidently, proposed, *contra,*) in the interlocutory proceeding of present resort, by the at least, thriftful, counsel opposed.

Bridge Proprietors v. Hoboken, 7 Wall. 143.

Foreman v. Nichols, 8 Wall. 56.

See also Wilson v. Marsh & Co., 2 Peters, 245.
Satterlee v. Matthewson, 2 Peters, 380.
Jackson v. Lampkin, 3 Peters, 280.
Ableman v. Booth, 21 Howard, 506.

RIGHT TO USE ADVERSARIES TESTIMONY.

"A party who has cross-examined a witness under our practice acquires a right to use the deposition of the witness, as if it had been taken in his own behalf, if his adversary, at whose instance it was taken, declines to use it."
Stewart v. Flood, 10 Ala. 600.
Garnett v. Yoe, 17 Ala. 74.

"The right of being heard in a pending cause, as a witness in his own behalf, is beyond controversy, guaranteed by the Federal Constitution, first, by the provisions of Article v, in the Federal Courts; second, by the provisions of the XIV amendment of that instrument in the State courts; and is not therefore to be denied by the States, or by those assuming to act under their authority—directly or indirectly, however or by whomsoever attempted.
93 U. S. Reports.

Extract from

AN ACT

To regulate the sale of real estate for unpaid municipal taxes in the city of Montgomery.

SEC. 9. Be it further enacted, That the owner or mortgagee of any interest in said property so sold, whether in possession, reversion or remainder may, at any time before the execution of the deed provided for in section six of this act, redeem any property so sold, by *paying to the clerk of the City Council*, the amount for which such property was bid off, &c., &c.

SEC. 13. Be it further enacted, That the certificate to the purchaser under this act shall anthorize the purchaser or his assignee to enter upon or maintain ejectment for the possession of the premises so sold against the former owner, if the sale was made as required by the act and was not invalid.

And in addition to the right of redemption so secured by section nine of this act, the owner or mortgagee of any interest in the property, whether in possession, reversion or remainder, may redeem the same at any time, *within two years from the time the purchaser enters upon or obtains possession of the property*, on the terms and conditions prescribed in section nine of this act, &c., &c.

Approved February 17, 1883.
Session Acts *of* Ala. 1884–5, pages 770–71.

ARGUMENT.

Consulting the record, then, it appears in the affidavit supporting the plaintiff's in error's motion,

1. That the testimony sought, by the plaintiff in error, to be considered in the cause, was constructively, if not actually, in the possession, or control at least, of the court.

II. That it was, therefore arbitrarily excluded by the decision of the learned chancellor on the motion; contrary, as it was, and is, to the provisions of the Federal Constitution, Sec. XIV. That the exclusion, of necessity involved *the chancellor's consideration* of the consitutional right secured to the plaintiff in error, by said provision. And thus, at once, arose the right of the plaintiff in error, to come before this honorable court, asking its consideration of the chancellor's action, and the facts basing it, as deduced from the uncontroverted, and thus admitted affidavit, supporting the motion, and this—we submit—only!

III. Guided by these facts, we assume it to be apparent that an attempt was made during the progress of the case on trial,

not to continue the cause to take testimony, as interpreted by the court below—and, but followed, by the honorable by the Supreme Court, plainly—but, to have the court *consider and pass upon testimony in complainant's behalf already in the cause;* as a fact of the case wholly uncontradicted; and, too, unassailed, except by the observation of the chancellor in reconciliation, seemingly, of his denial of the constitutional right involved in the motion; while this denial was quite as plainly due to the effect on the court's mind of the unrecorded, and, of necessity, vague recollections of both His Honor and Mr. Stringfellow, treated as evidence and given all the dignity of sworn statements, duly elicited, though of subsequent suggestion and without the opportunity, palpably, of testing their accuracy by means and modes common to testimony taken in usual course and as required by law.

Again—calling attention to the fact, that the approbation of the learned Chief Justice above, of the chancellor's denial of the motion was palpably due to his misconception that it was "to continue the cause on trial, to take testimony," and not, therefore, "to produce testimony, theretofore, taken".

Respectfully submitted,

WINTER & WINTER.

John M. Chilton.

Counsel for the Plaintiff in Error.

P. S.—On motion to dismiss an appeal for want of jurisdiction, the burden is on the movant to show that the record, on its face—admitting every allegation of it to be true, and drawing every intendment thereof favorable to jurisdiction, that can be drawn—yet no jurisdiction is shown. It is in its very nature, a *demurrer* to the appeal, because it shows on its face no jurisdiction.

THE SUPREME COURT OF ALABAMA.

From the Chancery Court at Montgomery.

SALLIE G. THORINGTON

vs.

THE CITY COUNCIL OF MONTGOMERY.

Appellant's Application for Rehearing.

To employ the strikingly concise language of the learned court on a former appeal of this cause—82 Ala. 594—the case made by the bill is substantially as follows:

"Under a bill filed for the purpose by the City Council of Montgomery, against Mary E. Winter and others, the Chancery Court in August, 1884, rendered a decree for taxes, due before that year, on several lots or parcels of land in the city, for about $4,500; declared a lien on the same for the payment of the tax, and ordered their sale, if the demand was not paid as directed."

"On appeal, that decree was affirmed in this court, Dec. 10, 1885.—Winter v. The City Council, 70 Ala. 485."

"In October, 1885, under the act approved February 17th, 1885,—Sess. Acts 1884–85, page 707—the City Recorder of Montgomery ordered certain of said lots to be sold for unpaid taxes for 1884."

"On November 30, 1885, the Clerk of said City Council, after due advertisement, proceeded to sell three of said lots, under said decree; and Mrs. Thorington became the purchaser, paying the amount of the taxes against them, for 1884, and all charges and costs claimed in that proceeding."

"The Clerk thereupon gave her certificates of purchase as the statute requires; and the bill in this cause was filed to

enjoin the City Council respondent from selling the property embraced in her said purchase, under the aforesaid decree of August, 1884."

"The Chancellor disposed of the case on demurrer, and on the motion to dismiss for want of equity; and we can only consider the questions in the same light. There is nothing before us to authorize inquiry into the *bona fides* of Mrs. Thorington's purchase. In our decision we must treat as true every sufficient averment of the bill."

Adopting the more than lucid statement quoted, as setting out, not only the case that it analyzes, but that now before the court—for that, critically considered, it is substantially if not literally unchanged—the appellant respectfully petitions the court for

A REHEARING

on the following grounds, to-wit:

I. The decision on the appeal considered is evidently based on the court's palpable misapprehension of certain of the material facts evidenced by the transcript.

II. As of the facts referred to, the complainant's motion of October 16th, 1891, was not, as plainly misconceived by the learned court,—"a motion to continue the cause pending trial, to enable complainant to take testimony,"—but—if the motion is allowed to speak for itself—a motion and demand by complainant, to be allowed the use and benefit on the hearing, of testimony theretofore taken by the respondent, and crossed by complainant, which was clearly at command of the court; but which said motion was denied by the Chancellor, contrary to the demands of constitutional provisions; and alike to the provisions of the Code of 1886, section 657, reading: "If the cause or proceeding in which the substitution of a lost or destroyed paper, is proposed, be pending and undetermined, the substitution must be made on notice of not less than one day, to the adverse party, or his solicitor or attorney of record," &c.; the learned Chief-Justice, dealing with the proposition, treating it rather as a "motion to continue the cause, pending trial, to take tes-

timony;" and, accordingly, disposing of the questions raised by the Chancellor's denial, in the words following, to-wit: "The application made October 16th, 1890, made as it was, pending the trial, was addressed to the court's discretion, and we can not revise it."

State Constitution, Article 1, section 14: "All courts shall be open, and any person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due process of law."

III. "Discretion," strictly defined, is not unlimited license! To illustrate—the refusal of a motion to continue the cause, made pending the trial, in order to take testimony even, would, under imaginable facts,—such, for example, as those in the motion discussed—be construed by the Supreme Court as an abuse of the authority conferred; an arbitrary exercise of power, possibly! Hence, without the pale of, legally defined, discretion; and, therefore, reviewable. "Continuance and its terms are matters of discretion, not revisable unless the conditions required amount to an improper and unjust abuse of the discretion.—Dudley v. Witter, 46 Ala. 664."

IV. In arriving at the pertinent facts or incidents of the motion, the matter certified to by the register, as constituting them, will be alone regarded by the appellate court; and the evidence supporting the motion, as set out in the uncontroverted affidavit here exhibited, would, therefore, be alone considered. And thus, the, "later suggested," but wholly unverified recollections of the Chancellor, together with those of like type of Mr. Stringfellow, suggested by His Honor in opposition to the motion—will be unconsidered by this court, on review of the decision and opinion on the motion;—these volunteer and legally unsupported statements, having none of the force or attributes of evidence on the trial of the case raised by the motion: first, because, on principle, they are not to be so dignified; second, because made under facts and circumstances precluding all opportunity to controvert or qualify them; while it is plain that they were given by the Chancellor, all the weight of duly proved facts, on the trial of the case raised by the motion, and, to its loss,

we are forced to believe, contrary, certainly, to what would, on reason, have been the result, had these "off statements" played no part in the evidently anomalous proceeding! While, to go yet a little further, it is to be observed that the case decided by His Honor was unqualifiedly foreign to that raised by the motion, and of no possible bearing whatever; unless, a motion to have produced and brought into court, the testimony of Mrs. Thorington (theretofore taken), for use in her behalf on the pending hearing, is the equivalent of "a motion to continue the cause on hearing, in order to take the testimony of her mother, Mrs. M. E. Winter;" as plainly interpreted, strange to say, by his Honor the Chancellor! For, certainly, the record shows that the object of the motion was to "have produced" the testimony (before taken) of Mrs. Thorington, the complainant, for her use on the pending hearing;—and, by clearest presumption, at immediate command of the court trying the cause. And not, therefore, "a motion to continue the cause, in order to have the testimony" of Mrs. Winter (her mother) taken, in complainant's behalf and for her, the said complainant's use, in the cause.

V. That so regarded, it is in all earnestness submitted, that the demand made upon the Chancellor was of matter of legal right under the Constitution of the State, and thus, not a matter of "discretion" simply; as would have been the very different question, of course, raised by "a motion pending trial to continue the cause to take testimony." And thus, that the intimation of the learned Court of "*laches*," evidenced by the record, seems to be unequivocally met, and the conclusion of neglect fully rebutted by the facts.

VI. For, with the uncontroverted testimony of the complainant, Mrs. Thorington—shown to be in the custody and keeping of the Commissioner—there could have been no necessity for taking further testimony in respect to the matters embraced; and thus no such taking was attempted; nor should have been, as clearly appears on the face of the facts for proper consideration, supplied by the record.

VII. As another point in the case, seemingly of controlling importance, no allegation is made in the answer or in any amendment of the answer, of the continued occupation and control of the property by the original owner. Hence, no proof attempted, of such occupation or control, was allowable. And yet, this, so-called, proof, is made the founding reason of the Chancellor's final decree and opinion in the cause.

VIII. That it is held in this very case, by the Supreme Court, to accord with the decisions before and since made by other courts of last resort, that taxes on realty, if the owner is a married woman and thus not "*sui juris*," are purely a charge *in rem*. Hence, any judgment based on such a claim, is a judgment "*in rem*," imposing no personal obligation, of course, on the married woman, owner. While, in the cause before the Chancellor here concerned, the decree rendered was, on its face, and, as petioned by the bill, a decree "*in rem*" purely; and for that, if for no other reason, not a decree "*in personam*," to be executed, were it a personal judgment, on other property, then or since owned by such an owner.

So that, had the property concerned in the proceeding been sold to a stranger buyer, the married woman owner could have redeemed it, under the provisions of the statute of 1885—a copy of the redemption clauses of which we be beg to assert—without resubjecting it to the demands of the decree. While it follows that if, to avoid every suggestion of purpose to pay "the decree," as in contradistinction to her debt—it were shown by the requisite proof in the cause, that Mrs. Winter had arranged to have her daughter, Mrs. Thorington, buy and pay for the property, surreptitiously, even, with her the said owner's money, for her the said owner's account, there would on principle, be nothing in the circumstance, surely to justify the imputation of "fraud;" and no reason, certainly, for contending that the property would be any the more subject to the unpaid balance of the decree.

To go yet further, had the owner directly and openly bid for and bought the judgment creditor's interest in the property, as being all that was to, or could be sold under the execution,

saying, to avoid every counter inference, "I do not propose to pay anything on the judgment; but, to buy and hold what may be sold," the legal result would have been unvaried by the different incidents of the case, unless wrong is right—right wrong!—it not being in any case material as to how she re-acquired or, to be more accurate, freed from the judgment lien the property concerned; but, simply, whether she as a married woman owner, neither morally nor legally bound to pay the decree concerned, stsnds, in point of fact and law, on the same footing with the radically differently circumstanced, "*sui juris*" owner, personally held and bound, in that case, to pay the "debt;" and who, therefore, could by no possibility buy, and pay for his purchase, a sum less than the sum of his judgment debt, without subjecting it to resale under the unsatisfied execution; and who alone could for such reason—and for such reason only—perpetrate a fraud on the judgment creditor, by covertly buying the property with object to avoid paying the balance of the unpaid decree.

"The reason for the rule is plain and if the facts be such as to put the case within it, it will be upheld."

IX. "Fraud" is a fact to be proved; and the facts, basing the charge, must not only be alike proven, but such on their face, as that they are not to be reconciled on any other reasonable hypothesis.

A court of equity will not impute fraud when the facts and circumstances out of which it may arise may consist with pure intentions. To create such an imputation the facts and circumstances must appear to be such as cannot be otherwise reasonably explained.—Tompkins vs. Nichols, 53 Ala. 266; Steele vs. Kunkle & Lehr, 3 Ala. 358; Smith v. Branch Bank of Mobile, 21 Ala. 25; The Alabama Life Insurance Trust Co. vs. Tetway, 21 Ala. 566.

Where the allegation, whether negative or affirmative, involves a charge of fraud, or other like violation of the laws of God and man, the party alleging it must prove it.

Note.—The facts relied on, to sustain the charge, must be alleged, however, before they can be proved, that the other side may have reasonable opportunity to meet them.

For, in every such case, the presumption of law, always in favor of innocence, is in favor of the party charged.

Greenleaf Ev. 86—as diametrically opposed, we submit, to the holding in the cause discussed, which evidently grounds its decision on a "presumption," in contradistinction to "proof"—when the court says—after asserting its reasons for its action—"We hold that a strong presumption is raised that the title of the property was collusively placed in Mrs. Thorington, in secret trust for Mrs. Mary E. Winter, her mother; and there is really no change in the beneficial ownership." Though to repeat, as before most deferentially suggested, were the incidents so presumed, "admitted facts" even, of this unusually interesting case, the result would, on principle, not be, as a question of law, to resubject the property concerned, to the further force of the unpaid decree.

X. The inference, to go further, of any absolute sale of the property to Mrs. Thorington, from any proofs, to be legally considered, of the continued possession and control imputed, is not, we submit, warranted, when reflected, that it might have been unredeemed—and most likely was—by reason of some understanding, to be readily and most reasonably believed, intended to force the respondents to first sell other property subject, and all sufficient, to pay the decree; and thus, satisfy it, to the even quicker settlement of the question here concerned. While the histories of the case throughout, indisputably show that the true question and real bone of contention between the parties litigant, was and, in point of fact is—"shall the respondent be made to first sell the other property, subject to the decree, as the most devoutly to be wished result—and so leave untouched, that concerned in this proceeding?"

XI. It is a fundamental maxim both in this court and courts of law, that no proof can be admitted of any matter which is not noticed in the pleadings.

XII. Proof taken or attempted to be taken in respect to matter not alleged in the answer, not being allowable in courts

of law or equity, and there being nothing more done by the respondents, but to so speculate on the indulgencies of the Chancellor, the cause before his Honor represented by this appeal, comes back again to this honorable court, under the withering declaration of the learned Chief Justice—as pungent now as "when dread Apollo's bow was strung:" The Chancellor "disposed of the case on demurrer and on the motion to dismiss for want of equity, and we can only consider the questions concerned, in the same light."

"There is nothing before us, to authorize us, to inquire into the *bona fides* of Mrs. Thorington's purchase."

"In our decision we must treat as true, every sufficient averment of the bill."

XIII. To return—however—the maxim which maintains that no proof can be made of matter not alleged has been adopted in order to obviate the great inconvenience to which parties would be exposed, if they were liable to be affected by evidence at the hearing, of the intention to introduce which, they had received no notice.—Dan. Ch. Prac. Secs. 712, 853.

XIV. Applying, to repeat, the principle so announced—the continued possession and control of the property concerned in the suit,—given such overwhelming emphasis and incomparable dignity by the learned court, below!—not having been alleged in the answer, or in any amendment to the answer, should, on principle and authority, have been disregarded; and all proof attempted in respect to that matter, treated as a nullity;—if decisions are to be respected, their teachings heeded!

XV. That, in the absence of all proof of the character of the estate concerned in this proceeding, in Mrs. Winter, the law presumes it to be a statutory estate, with the rents, incomes and profits thereof in her husband.

That so regarded, it will be presumed, surely, that the wife was without the personal means to pay the tax basing the decree concerned; and thus under neither legal nor moral duty, to satisfy the decree! While, it will scarcely be contended that

the husband was legally bound to pay the judgment; and thus, that failing to do so, an action would lie against him, to compel him to pay it!—as negativing, certainly, every suggestion of duty, legal or moral, on the part of either, to the judgment creditor, to settle the judgment; or, of intention to do so, on the showings of the case to be with legal propriety, considered; we, with all emphasis, respectfully submit.

XVI. That if, therefore, true, that neither Mrs. Winter nor her husband, were, legally or morally bound to pay the decree, then, nothing shown by this proceeding and the proofs, of proper consideration, to have been incidentally done by either, can or should reasonably imply an intention to settle in part or in whole, the decree;—nothing, from which such an inference can or may possibly be drawn! But, and to the contrary, the histories of the case before the court, to be fairly and legally deduced from the record, as it must be read, show, that the effort had long openly been, to defeat that seemingly unsanctioned demand. And, pardon us for insisting, under facts and circumstances which, rightly understood, may not only challenge criticism, but the approbation of the unbiased just.

Other objections to the conclusions of the no less able opinion, will, by consent, be hereafter presented in behalf of the petitioner, with reasonable opportunity given the counsel, who has the honor to address this Honorable Court;—but who, for reasons personally stated to his honor the Chief Justice, may and most certainly will not, be able to complete his representation until some time after the coming month; when he proposes, with the approbation of the learned court, to furnish both authority and argument, believed alike unanswerable in support; and which, therefore, may possibly serve, to make this appeal for reconsideration a successful address to. "the sober second thought" of the court, in a matter, certainly, of unusual gravity and common, if not of universal concern!

For the convenience of the court, we append as "Exhibit A," a copy of the better statement of the case than we could otherwise supply, set out and taken from the able opinion,

most diffidently and yet frankly criticised. And, with it, as Exhibit B, a copy of the two motions of April and October 1890, respectively; besides, a copy of the uncontroverted affidavits in support; and which, it would seem, somewhat to our surprise, His Honor, the Chancellor, did not regard himself bound to consider; or, at least, to treat as evidence in the cause made by the motion, before him; nor even, to put on a footing with the necessarily loose and uncertain recollections of His Honor; nor, of those of like looseness and uncertainty, of the more complimented commissioner, considered in connection—and plainly basing the conclusions at length attained, and which it, accordingly, becomes necessary to bring to the attention, on review, of this honorable court.

That, in a word, a perhaps, more critical analysis of the case presented by the record, eliminated of its irrelevant matter, will convince your honors, that the hearing below, was, practically, without any of the opportunities contemplated by law, or reasonably necessary to determine its merits before a high court of equity.

That the, possibly, too ardent Chancellor, resolved, no doubt, "to do his duty, his whole duty and nothing but his duty," to the unusually interesting questions before him, was unwittingly more enthusiastic than sound. And, as the, by no means singular, consequence, that he was at leng h too much on the tax side of the question; and finally committed to a decision and opinion which will scarcely withstand the probings of the unbiased better judgment of the High Tribunal whose high duty, fortunately, it is, to review him.

Distinctly disclaiming all intended disrespect to his honor, the court's most respectful and obedient servant.

J. S. WINTER,
for complainant.

To go, with the court's consent yet a little further, a careful reading of the motions of April and October, and the supporting affidavits will show that the object of complainant's counsel was to follow up the motion, in fact, before the court—should it be found necessary, but, in that event only,—with a motion

to be allowed to re-establish the testimony, theretofore taken, of the complainant, Mrs. Thorington, by the requisite substitution of such testimony; as plainly distinguished from the wholly different proposition mistakenly suggested by the Chancellor's decision—"to have the testimony of complainant's mother, Mrs. Winter, taken"—not re-established—and the cause continued to enable counsel to effect that particular and wholly different purpose and object. And thus, that the ruling of the Chancellor was palpably upon an entirely different proposition and question, from that so, in fact, before the Chancellor; and which, accordingly, was without benefit, necessarily, or the learned court's consideration, or decision on the question presented by the motion;—though the relief sought by it was quite as effectively denied, notwithstanding!

MOTION, APRIL 14, 1890.

State of Alabama, Montgomery County.

In chancery at Montgomery.

Sallie G. Thorington v. The City Council of Montgomery.

Motion is hereby made by complainant to have the respondents bring into court, by its proper order—or to have otherwise produced in court, the testimony taken by them heretofore, and as named and described in the affidavit hereto annexed, marked "Exhibit H," and to which reference is respectfully craved, for use, by complainant in her own behalf, in the said cause; or, if that may not be consistently and legally done, that reasonable opportunity be given complainant to further fortify her case herein, by allowing complainant reasonable opportunity, to reestablish the said testimony so taken, for use in complainant's behalf in this cause.

For the complainant and the motion,

ARRINGTON & GRAHAM,
WINTER & WINTER.

EXHIBIT H, TO MOTION.

State of Alabama, Montgomery County.

Sallie G. Thorington v. The City Council of Montgomery.

J. S. Winter of said State and county being duly sworn

deposeth and saith, that he is of the complainant's solicitors in the said cause. That some time before the trial of the same, in April, 1889, before his Honor, the Chancellor, the solicitor, for the respondent, obtained an order in the cause for the examination as witnesses in their behalf, of the affiant and the complainant Sallie G. Thorington and others, as disclosed by the record in the cause, with object, among other things, to show by the testimony of the said witnesses that the money paid the respondent, in the settlement of complainant's purchase at the tax sale—set out in the complaint—of the property concerned in the suit, belonged to, or was supplied by the owner of the property, and the mother of complainant to-wit—Mrs. Mary E. Winter;—and not by her the said complainant.

2. That interrogatories were duly filed and the same crossed by complainant; and the commissioner, one Horace Stringfellow, Esq., appointed by the court to take said testimony; and, that pursuant to the authority so given by the honorable court, the aforesaid Sallie G. Thorington, was duly examined under the said commission, that issued to the said Stringfellow for her examination as a witness, for use by either side in said premises; and that the said complainant, the said Sallie G. Thorington, testified before the said commissioner among other things, that the money employed in the said purchase, was her own; that it belonged to her, the said Sallie G. Thorington, in her own right in all respects; and that the bid made in her name, for the property so concerned and before named, was by and under her previous request and authority, for her, by this affiant; and, to enable him to pay for the property in the event she should thereby become the purchaser of the same, that she, the said Sallie G. Thorington, supplied to this affiant, the said Winter, the money necessary to pay for the same, under the said bid; and that the same was accordingly so paid by affiant, and so taken and received by the respondent. That the last named statement was made on information and belief—and, that the purchase was in all respects bona fide, or statements to this effect—for account and risk in all respects of the said complainant, the said Sallie G. Thorington.

3. Affiant further says, that he, on the 11th day of April, 1890, just past, enquired of the clerk of the register of the honorable court, the present whereabouts of the papers, so concerned and so entirely important to this cause, and that he was unable to get them.

That the answer was, that no return was within his knowledge, ever made by the said Stringfellow, of his doings under the authority of the said commission.

But affiant avers, that the same were suppressed, or that he has reason to so believe; and affiant further says that complainant assuming that due return would be or had been made of the testimony so taken, as aforesaid, leaned upon it to show, the true status of the facts, and has not therefore, taken or caused to be taken, any testimony whatever; and, that as counsel for complainant, he the said affiant, can not and does not advise going to trial in this cause without proof directly made in terms, of the bona fides, of the said purchase, by the said complainant of the property concerned, aforesaid;—of the payment by her of the purchase-money through a duly authorized agent in that behalf;—and, that the money so paid was in fact and truth, hers, as a matter within the actual knowledge of the affiant.

And affiant further says that the facts so suggested are susceptible of proof and that if allowed the opportunity he expects to have due proof made of same; and, that this application is made in good faith, &c.

J. S. WINTER.

Sworn to and subscribed, this the 14th day of April, 1890.

V. M. ELMORE, Register, &c.

MOTION BY COMPLAINANT, FILED OCT. 16, 1890.

State of Alabama, Montgomery County.

In Chancery at Montgomery.

Sallie G. Thorington v. The City Council of Montgomery.

The complainant in the cause so above stated, respectfully moved the court for its order setting aside the submission made

of the said cause on yesterday, and which still pends as far as may be necessary to the court's consideration and judgment upon—and for its consideration and judgment upon—a motion made at the last term of this honorable court, filed on the 14th day of April of thesaid term, and to which reference is hereby accordingly made; and in support of said motion, begs to append thereto and as a part thereof, the affidavit marked Exhibit A, annexed.

For the motion,

ARRINGTON & GRAHAM,
WINTER & WINTER,
Solicitors for complainant.

EXHIBIT A TO MOTION.

State of Alabama, Montgomery County.

Sallie G. Thorington v. The City Council of Montgomery.

J. S. Winter, of said State and county, being duly sworn, deposeth and saith—that he is of complainant's counsel in said cause, and has been, since the inception of same. That, as such counsel, he has in point of fact looked after the details more, perhaps, than any other of the complainant's counsel; and accordingly was, perhaps, better informed as to these details. That at the last term of this honorable court, it happened that when the case was reached on its appointed call, he, the said affiant, was the only solicitor of either side who responded to the call; and the only one present at such call; and that while expecting and intending to argue the motion made by the complainant on the 14th day of April last, and referred to, in the motion, of which this affidavit is a part, on the said call, he was cut off by his Honor's prompt remark addressed to this affiant, on the failure of the opposite side to answer as their names were called—"There being no one here to represent the respondent the case is with the complainant, and I will make whatever order her counsel may suggest."

That, instead of making the submission practicable, at such disadvantage to the respondents, affiant simply suggested in

reply a continuance of the cause, which was accordingly granted by his Honor, the Chancellor; and thus no advantage was taken of opposing counsel's absence. That at such time, affiant had been quite unwell for several days, and had indeed been, and was, under the treatment of a physician, and was accordingly forced to return at once home; where it soon became evident that he was laboring under what subsequently became a severe attack of typhoid fever; that it continued without intermission for a period of forty days; and that after the lapse of just or about three months, only was he able to reach or to be carried to the railroad as a means of getting benefit of the change of locality deemed necessary by his medical advisors, to his ultimate recovery; and on the night of the 14th of October only did he reach the city; and that in coming, he came only to attend the trial of the cause herein; while advised against the return by medical advisors, protesting that he was and is still too feeble and otherwise disqualified to take part therein; that exhausted by the railroad trip, of about three hundred miles, necessary to his return on the said 14th instant, he reached the court room at 9:50 o'clock A. M., (while the case had been set the previous week) at 10 o'clock A. M., of the 15th—yesterday—to find the testimony published; and, that for reasons, best known, perhaps, to respondents, this did not include the testimony of the complainant, Mrs. S. G. Thorington, referred to in the affidavit of the 14th of April last, 1890; and, that the said publication was therefore without opportunity, of course, given complainant to call up and have disposed of the motion so named. That affiant filed said motion according to the best of his recollections, and so accordingly says, without the knowledge, as it happened, of the associate counsel; and had, himself, for the time forgotten in his, necessarily, clouded condition, under the facts, that he had in fact made it; and accordingly pressed the court, when informed of the publication and submission of yesterday, aforesaid, to be allowed to set out a motion having a like object, and a like effect, which was refused on the ground, that it should have been made earlier, if intended for use at the term of the court; on account, in other words, of the seeming

laches of complainant, in not having made it earlier in the term; affiant submitting, however, that there was after all no laches on the facts in respondent position to the premises; and the motion necessary to get for the complainant advantage of the testimony named in affiant's affidavit of April 14th, 1890, aforesaid.

And affiant further says, that he had no opportunity before the case was called, for the necessary conference with his associate counsel therein, Col. Arrington, even had he been mentally and physically equal to it, as he, in fact, was not; that the entire proceedings transpired in such rapid way, as to debar his recollecting the incidents of the case, at the last term of the court; and that he will, if allowed the necessary time in that behalf, be enabled to promptly prove by other witnesses, the facts generally set out in the affidavit, aforesaid, filed on the 14th day of April last, as aforesaid, and as of particular bearing on the case, to which the complainant testified before Commissioner Horace Stringfellow, aforesaid, to-wit—that the money employed in the said purchase, was her own, that it belonged to her, the said Sallie G., in her own right in all respects, and that the bid made in her name for the property concerned, was made by and under her previous request and authority for her by this affiant. And further deponent saith not.

J. S. WINTER.

Sworn to and subscribed before me this the 16th day of October, A. D., 1890.

V. M. ELMORE, Register.

Filed in office October 16, 1890.

V. M. ELMORE, Register.

EXHIBIT B.

Supreme Court of Alabama, November Term 1891-2.
3d. Division 420.

Sallie G. Thorington vs. City Council of Montgomery.

Appeal from Montgomery Chancery Court.

STONE, C. J.—The present suit was instituted in January 3,

1886. It has been twice before in this court.—82 Ala. 591—S. C.; 2 So. Rep. 513; 88 Ala. 548; S. C. 750 Rep. 368.

It grew out of the suit of "Winter v. City Council of Montgomery." Reported in 79 Ala. 481.

At the Spring Term, 1890, of the Chancery Court, a motion was filed by complainant for an order to compel the respondent, to produce in court, the testimony of J. S. Winter and others, alleged to have been taken by respondent, "and, if that may not be consistently and legally done, that reasonable opportunity be given complainant, to further fortify her cause herein, by allowing complainant reasonable opportunity to re-establish the said testimony, as taken, for use in complainant's behalf, in this cause." This motion was accompanied by an affidavit of J. S. Winter, in which he set forth, that the deposition of Sallie G. Thorington had been taken for respondent, on interrogatories filed and crossed; and, that in said deposition she had testified that the lots in controversy in this suit were purchased with her money, at her request, and in good faith. The affidavit further stated "that complainant, assuming that due return would be, or had been made of the testimony taken as aforesaid, leaned upon it to show the true status of the facts, and had not, therefore, taken, or caused to be taken, any testimony whatever; and, as counsel for complainant he, the said affiant, cannot and dors not, advise going to trial in the cause without proof directly made on terms, of the *bona fides* of the said purchase by the said complainant of the property concerned, as aforesaid; and of the payment of the purchase money through a duly authorized agent on that behalf; and that the money so paid was in fact and in truth, hers, is a matter within the actual personal knowledge, of the affiant.

And affiant further says, that the matters and things so suggested are susceptible of proof; and, if allowed the opportunity, affiant expects to and will have due proof made of the same, within reasonable time, &c.

This motion and the accompanying affidavit were, by the Register, marked filed April 14, 1890.

The case was not tried at that term, but no entry was made

of record, showing that the cause was continued. Neither is it shown that any action was taken on the motion; or that the attention of the court was called to it.

The next orders in this case, shown by the record, were made in the October Term, 1890.

The first, was an order of publication. Then followed an order of submission, with a note of the testimony.

These are dated October 15, 1890.

On October 16, motion was made by complainant, accompanied by an affidavit of J. S. Winter, to set aside the submission, and grant to complainant, time "to take testimony by which she proposed to prove the purchase of the lots in good faith and with her money.

This affidavit sets forth the long protracted illness of affiant, one of the plaintiff's counsel, which disabled him to prepare the case for trial."

Two other solicitors, it appears, had prepared and filed the bill.

It was signed by them, and they join in the assignment of errors.

The affidavit sets forth no reason why the testimony had not been procured by the other solicitors. The only excuse looking in this direction, is the clause on the affidavit, which asserts that J. S. Winter, the affiant, has in point of fact looked after the details more, perhaps, than any other of the complainant's counsel therein; and, accordingly was, perhaps, better informed as to these details.

The Chancellor responded to this motion and affidavit, as follows:

"The complainant, after the argument of this cause had been made, said J. S. Winter interposed for complainant on application that the submission be set aside in order that he might submit a motion made at the last term of the court, which was filed by the Register, but was not submitted to the court. This motion was filed by the Register at the April Term of the court (and which was never submitted to the court or acted upon) and was that the court should instruct the Commissioner, Horace Stringfellow, to return into court,

how he had taken or acted under a commission issued to him to take the deposition of Mrs. Mary E. Winter and of complainant, at the instance of defendant, upon interrogatories filed by defendant, and to return the deposition of such witnesses or either of them, that he had taken.

"Upon examination of the facts in this cause, I find that, at a former term, said J. S. Winter had asked the court to instruct the Commissioner to return said deposition of M. E. Winter, to him, and to return the commission to the court, as having been improperly issued.

Upon a hearing of the application of J. S. Winter, the court directed the Commissioner to take whatever action in the matter he might choose; either to destroy said deposition, or retain it; but in no event to permit either party to this suit to examine it.

It was held that the deposition had been taken improperly, because no commission had been properly issued.

And that, as Mr. Stringfellow had acted without legal authority in taking the deposition, it was the right of Mr. Winter representing the complainant to ask the court, that the deposition, should not be subject to the scrutiny of defendant's counsel. The order which I made, was verbal; and was made at Mr. Winter's suggestion; but was a little different from his request.

His request was, that I direct the Commissioner to return the deposition to the witness; or to herself; but, I made the order to keep the deposition secret from all parties or destroy it, as he desired.

If this deposition was now, before the court, it could not be used for any purpose unless in the meantime, the deposition of the witness, had subsequently been taken, and the deposition, taken by Mr. Stringfellow, should be offered in contradiction of any of the statements therein.

But I append hereto a statement, of Mr. Stringfellow, that the deposition, had been destroyed. It could, therefore, do no good to any person now, to take any action therein, at this time.

It cannot be disputed that if any one desired to take

action in the matter to get the deposition, of either of these witnesses, there has been ample time to have done so.

The submission in this cause, was made, without any application for a commission in order to get the deposition of these witnesses, one of whom is the complainant.

The complainant has never taken any steps during the time this case has been continued from year to year, to get her own, or her mother's deposition in the case.

Under these circumstances, the motion to set aside the submission on that ground is denied."

By the Chief Justice. "It is manifest there is nothing in the foregoing which we can review. No ruling is shown to have been had or even asked on the motion of April, 1890, further than, the indisputable fact, that the cause was continued at that time. On what ground the continuance was granted is not shown and the application made Oct. 16, 1890, made as it was pending the trial" was addressed to the court's discretion, and we can not revise it. In fact, motions for a continuance are never revisable.—3 Br. D. 404, *et seq.* It is just to appellants counsels———we have been considering is neither discussed nor claimed in his brief. We have considered it proper however that we should notice it in view of the remaining points to be considered.

The uncontradicted testimony is, that when the lots were sold for one year's assessment of city taxes, they were bid off by J. S. Winter, husband, and trustee of Mary E. Winter,—the owner, against whom, the assessment had been made. The price was the amount of the one year's taxes; a sum less than one per cent. of the proven value of the property, and much less than one tenth of the annual rental value.

When asked who was the purchaser he answered Sallie G. Thorington. Sallie G. Thorington is the daughter of J. S. Winter, and Mary E. Winter.

It is fully proven, that for years preceding the tax sale, J. S. Winter superintended the renting, taking rent notes payable to himself as trustee and that he collected the rents. The proof is full also that since the tax sale there have been no change.

He has continued to superintend the renting, still taking the rent notes, payable to himself as trustee and still collecting the rent as before.

If there had been any change in the possession or control of the property, or realty there is no proof of it.

It was clearly competent to prove the continued control of the property, and its rents by J. S. Winter, the trustee of Mary E. Winter.

The absence of visible change in the control and possession was, and is a circumstance to be weighed in determining whether there was a real change in the ownership of the property.

It is certainly unusual for real purchasers of property at public sale, to permit it to remain without change, in the hands of the original owner, for more than five years, with no offer of proof explanatory of so wide a departure from business methods.

Grouping the whole facts—the relationship of the parties, the insignificant sum for which such valuable property was sacrificed, and no offer or attempt made to redeem it—the continued possession and control of the property by the trustee of the original owner, the absence of proof, even, that Mrs. Thorington furnished the money, with which the purchase was made—we hold that a strong presumption is raised that the title to the property was collusively placed in Mrs. Thorington, in secret trust for Mary E Winter, her mother—and that there is no real change in the beneficial ownership.

There is no proof to overturn or weaken this presumption.

It is contended that the chancellor erred in not ordering the three lots not claimed by Mrs. Thorington to be first sold.

If that were shown to be an error in this case, we would correct it in this court.

It being shown however, that there has been no change in the ownership of the property, but that all the lots so far as the testimony informs us, still belong to the tax payer there is neither duty nor propriety in directing which lot or lots shall be sold first. Nothing is shown in the record bearing on the question of priority of burden.

Affirmed.

CLOPTON, J., not sitting.